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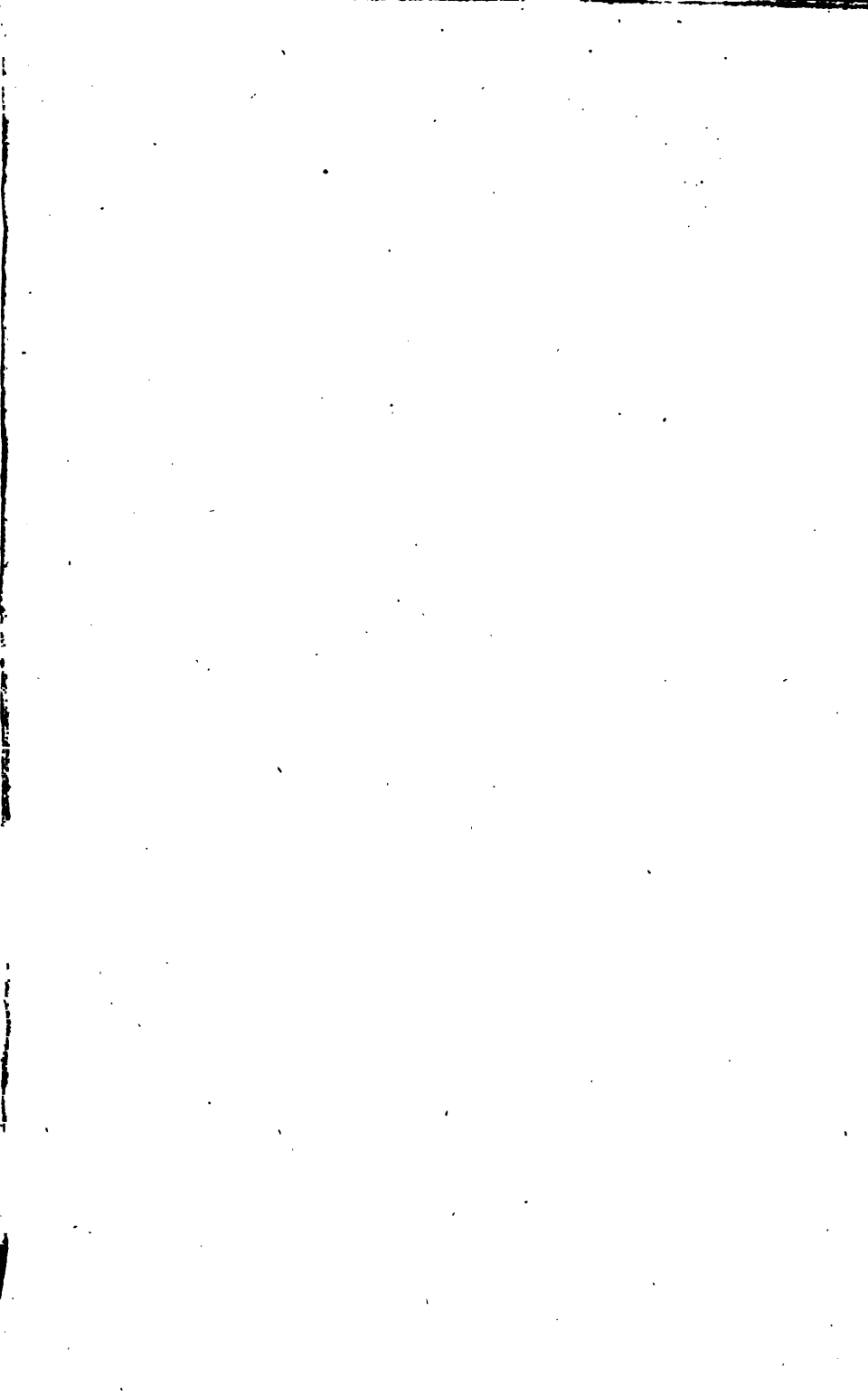
J. S. Palmer

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T H E  
LAW's DISPOSAL  
O F A  
PERSON's ESTATE

*Who DIES without WILL or TESTAMENT:*

S H E W I N G

In a clear, plain, easy, and familiar Manner,  
How a Man's FAMILY or RELATIONS will be  
entitled to his REAL and PERSONAL ESTATE, by  
the LAWS of ENGLAND, and Customs of the City  
of LONDON and Province of YORK.

TO WHICH IS ADDED

The Disposal of a Person's Estate,  
By WILL and TESTAMENT;

CONTAINING

An EXPLANATION of the MORTMAIN-ACT,  
With INSTRUCTIONS and necessary FORMS for every Person to  
make, alter, and republish his own WILL :

L I K E W I S E

DIRECTIONS for Executors how to act after the Testator's Death, with  
respect to proving his Will, taking upon them the Executorship, getting in  
the Effects, and paying Debts and Legacies.

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By PETER LOVELASS, of the INNER TEMPLE, Gent.  
Author of the Explanation of the Law concerning *Bills of Exchange*, &c.

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The SIXTH EDITION, with ADDITIONS.

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T H E  
P R E F A C E.

**F**ROM the number of books which contain the science of our law, and the numerous applications to persons conversant therein, for advice concerning the title to real and personal estate in cases of intestacy; it is indisputably clear that no selection could be made from the venerable pile of law-learning, more immediately useful, than that which relates to the estates of persons dying intestate; and of this the author hereof being convinced, was led to select the first part of this work; to which he has, since the publication thereof, made very considerable additions, and copiously treated on the law relative to last wills and testaments; and in the latter, as well as his former proceedings, hath endeavoured to avoid the technical terms of the law; and when the Latin words, or those terms, have occurred, and could not be avoided without obscuring the sense, has added the English to the one, and explained the meaning of the other; laying down the whole with such clearness and perspicuity, as to render the same perfectly intelligible and easy of comprehension to those unacquainted with the system of our law, or the phrases commonly used by writers thereon.

AND as since the fourth edition hereof was printed, there have been divers recent determinations in the court of chancery; the author has very minutely considered all his former subjects, and thereon made large additions and improvements, both from those new decisions, and various momentous points discussed by the learned authors of the notes on the thirteenth edition of Lord Coke's commentary upon Littleton; the fourth edition of Mr. Peere Williams's reports, and other eminent authorities; which are carefully cited, as may readily be seen on turning to the notes and citations at the bottom of different pages throughout this book, from whence many of the additions and improvements made in the fifth edition hereof will appear conspicuous, and divers others by attention being had to the full print contained in a great number of pages, and enlargement of the alphabetical index.

IN the first impression of this work, entitled, "The Will which the Law makes, &c." care was taken in explaining the different kinds of estates and effects a man might die possessed of, and in what manner the law would operate on failure of his having made any disposition thereof; shewing who would be entitled to the administration of his personal estate, and the method to be pursued by the administrator for obtaining it; and after the same was obtained, in what manner he should proceed for getting in the deceased's effects, and administering the same by paying debts, and distributing the surplus to such as were entitled thereto: likewise to whom the real estate would descend; how far the  
same

same might be liable to the ancestor's debts; the title an husband had thereto by the curtesy of England, and a wife with respect to dower. And herein care was also taken to explain the customs of the city of London and province of York, and to shew how those varied from each other, and both of them from the law of the nation in general; in what manner distribution was to be made amongst children, some of whom had been advanced in their parents lifetime; and the effects of such advancement, both by the customs, and common and statute law.

THE reception, and universal approbation, this impression met with from the Public in general, and gentlemen of the profession, incontrovertibly testified its merit very shortly after it came out of press, in March 1785; near fifteen hundred copies thereof, being sold in the course of a few months after; and the sale of three other editions from the 25th of March 1786, to the 23d of January 1788, is an indisputable testimony of the utility thereof, and the additions made thereto, while the work lay out of print for the purpose of adding that part whereof is entitled, "The Disposal of a Person's Estate by Will and Testament;" whereon as well as on the former subjects, very considerable improvements being made, the work is rendered far more extensively useful than heretofore.

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P R E F A C E  
TO THE  
S I X T H E D I T I O N.

THE authenticity of this work, and its singular use to the community at large, as well as to gentlemen of the profession, being so well known and approved, we need here only inform our readers of the improvement and addition made in pages 58, 255, to 258, the former in pursuance of remarks lately published by Mr. MUCHALL, whereby a passage is pointed out that appeared erroneous in the last edition, which an opportunity is now taken of correcting, and at the same time acknowledging that, the author hereof will always be more happy in discovering and correcting an error, than maintaining and persisting in it; and therefore with great pleasure declares his concurrence with Mr. MUCHALL's opinion concerning the discharge of an apprentice on the death of his master. The latter improvement is an abstract of a late statute concerning the disposal of, and methods to be pursued by, attorneys, executors, and administrators, for obtaining wages, prize-money, and other allowances, due for the service of seamen on board his majesty's ships.



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## EXPLANATION.

**F**OR more easy and expeditious discovering particular parts of this work, and fully explaining the same to those totally unacquainted with the law, and such, who from the contents hereafter set forth, may be less apt than persons conversant with law books, for discovering the heads of the different subjects herein contained, or the particulars thereof, by the alphabetical index; we shall here, in three instances, point out some material parts of the book, whereof a speedy discovery may be wished for upon an emergency, and afterwards make some observation with respect to administration, and explain the method of obtaining the same and proving a will by commission :

AND in the first instance, mention the case where a child may unexpectedly be informed of a father being dead intestate, having left both real and personal estate, and other children; one or more of whom were advanced by him in his life-time; and hath also left a widow, and a grandchild, or grandchildren. Now with respect to the personal estate, which implies money, goods, and things that go to the administrator, described page 28, SECT. 2d, to page 37; and is generally understood in contradistinction to real estate, described in pages 86, 87. To find what share of the former accrues to the widow, children, grandchild, or grandchildren, respectively, pursuant to the laws of England, see page 66, SECT. 2d, to page 73. (*where we have treated on distribution, as supposing administration to have been previously granted, as it is requisite that it should be, of which we shall again take notice in our procedure with this explanation*). For the children, grandchild, or grandchildren's title to the real estate, see page 87 to 89,

and for the widow's title to dower therein, see page 96, SECT. 2d, to page 100. If the father were a freeman of London, see page 103, SECT. 2d, to page 114. If he were an inhabitant of the province of York, see page 114 to 122.

2. WHERE there is an only legitimate child, or grandchild, of a person dead intestate, no other lawful begotten child of the deceased, or other descendant being alive at his death, or born alive afterwards, and he hath left no widow; such only child or grandchild, whether male or female, will have the whole of the deceased's real and personal estate. Concerning the personal estate, see pages 73, 74. If the deceased were a freeman of London, or an inhabitant of the province of York, the customs whereof do not extend to the grandchild, he will take the whole personal estate by the statute law, as see in pages 104. 111. 115; and as to the one child, see pages 112. 118. If the deceased have left a widow, such only child, or grandchild, by the laws of England will have two thirds of the personal estate, and the widow one third; the same as when there is more than one child to divide with the widow, as in page 81; but if the deceased were a freeman of London, or inhabitant of the province of York, the customs thereof entitle the widow to more than one third, as see page 103, SECT. 2d, &c. and page 114; &c. With respect to the deceased's real estate, such only child or grandchild must have the whole, subject to the widow's dower, treated on page 96, SECT. 3d, to page 100.

3. WHERE a kinsman, whether he be a brother, nephew, uncle, &c. is informed of a relation having died intestate, without any widow, child, grandchild, or other descendant, and hath left both real and personal estate; to find what of the latter accrues to the kinsman by his relation's decease, see page 81 to 83. For a description of persons who  
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can have no claim as kindred, see pages 84, 85. For the kinsman's title to his deceased relation's real estate, see page 89 to 93.—If the deceased hath left a widow and no child, or lineal descendant, by the laws of England, she shall have one half of his personal estate, and his next of kin the other, as see in page 73. But by the custom of London, and province of York, she hath considerably more than one half, as see page 104. 112. 119. Yet with respect to the deceased's real estate, this must go to his heir at law, treated on page 89 to 93. But subject to the widow's dower, treated on page 96, SECT. 3d, to page 100.

THE heir at law to the deceased, where there is no lineal descendant, may be one that may have no claim to any share of his personal estate, or he may be the person who alone is entitled to both the real and personal estate, or it may be that he may solely be entitled to the real estate, and only a share in the personal. This depends on what kindred the deceased hath left, and may be clearly comprehended if due attention hath been had to the parts of this work already pointed out; as in the first instance we gave a hint concerning personal, and real estate, that the former was described page 28, SECT. 2d, to page 37; the latter in pages 86, 87; and this was done with a view to furnish the reader with a just conception of, and difference between the former and the latter. In our third instance; for finding what of a deceased relation's personal estate accrues to a kinsman, we mentioned page 81 to 83; and for a description of persons who could have no claim as kindred, referred to pages 84, 85; and then for discovering the kinsman's title to his relation's real estate, we mentioned page 89 to 93: which being duly attended to, with what has been mentioned concerning the deceased's widow, the reader may clearly perceive in what manner kindred will be entitled to an intestate's real and personal estate, where there is no lineal descendant.

AND now the child, grandchild, kinsman, and widow, having, as it may be presumed, discovered what accrues by a parent, relation, or husband, dying intestate, and if it be real estate, which descends to the heir, hath seen in page 87, that the law casts the same upon him immediately on the death of his ancestor. But if it be personal estate, we must observe the case is different; and that for obtaining this, administration must be taken; which being fully treated on in the former part of this work, and so plainly appearing at the beginning of the contents thereof, *viz.* from page 2, SECT. 2d, home to the beginning of SECT. 6th; page 18, that it needs no further explanation; therefore we shall in our further proceeding, only explain the method of obtaining administration and proving a will by commission; as when an administrator, or executor, is ill, or lives at a great distance from London; and previous hereto, mention the manner of proving a will and doing other business for an executor by letter of attorney; and by what has been here pointed out, and the assistance of the ensuing contents, it is presumed, any reader will be enabled readily to discover, and fully comprehend the subjects treated on throughout this work.

WHEN administration or probate of a will is to be obtained from the prerogative court; as when the deceased hath left goods in two bishops diocesses (treated on page 6, SECT. 3d, to page 13); and the administrator, or executor, is ill, or lives at a great distance, the usual and proper method of obtaining the administration, or probate, is by commission, of which we are about to treat; but previous hereto, we may observe, that where the deceased hath died beyond sea, the ordinary will admit of his will being proved by a person empowered by letter of attorney from the executor; and hereby two purposes may be answered, *viz.* the purpose of proving the will and doing other business for the executor; the form whereof see, in page 254, N<sup>o</sup> XV. with  
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an abstract of a late act of parliament relative to letters of attorney and wills made by seamen in the king's service, and the steps to be taken to recover what is due to such of them as die intestate.

WHERE it may be requisite for *letters of administration* to be obtained by commission issued from the prerogative court, and the person or persons entitled thereto (described in pages 2, 3, 4, 5) being ill, or live at a great distance; it is usual to send up his or their christian and surnames, stating the relationship, by describing him or them, as the widow, child, father, brother, &c. of the deceased, with which may be sent his or their additions, *viz.* places of abode, and trades or occupations, to any reputable person, friend, or acquaintance, residing in or about London; the christian and surname, trade or occupation<sup>a</sup>, of the deceased, the day or time on which he died, mentioning the value of his goods, chattels, and credits, with the christian and surnames of *any* two clergymen in the neighbourhood. This the friend or acquaintance, to whom sent, takes to any one of the proctors belonging to the prerogative court, and thereby the proctor procures a commission for his employer to send to the administrator, who takes the same to the clergymen, and after having made oath before them, that the deceased died without will, &c. and executed a bond with two sureties (similar to the forms contained in pages 13, 14, 15) and one of the clergymen hath signed the commission, the administrator sends back the commission and bond to his friend, who takes the same to the proctor, and in the course of a few days after, provided 14 days are then expired from the time of the deceased's death, of which mention is made in page 13, SECT. 4th, receives of him the letters of administration, and pays the proctor such sum as shewn, page 192.

WHEN the right of administration devolves upon an infant, treated on in page 5, and again mentioned

<sup>a</sup> If the administrator or deceased hath used the title of *Esquire*, describe him thus.

page 124; it is usual to send up an account of the deceased in manner before mentioned, mentioning the day or time on which he died; and herewith it is requisite that an inventory of his goods, chattels, and credits be sent; the names of *any* two clergymen of the neighbourhood; and the christian, surname, and relationship, of the person or persons applying; and the christian, surnames, and ages, of all such legitimate children as the deceased hath left; the first of whom attaining 21 years of age being entitled to the administration, as we shall again presently mention: so if the deceased hath left no legitimate child or children, but brothers or sisters, or children of his brothers or sisters, on whom the right of administration devolves, and the first of whom on attaining 21 years of age will be entitled thereto; mention their respective names and ages, likewise the christian, surname and description, of the person or persons applying for the administration. And as on either of the infants attaining 21 years of age this administration ceaseth, and thereon a new administration must be granted; for obtaining the same, send up an account of what value the deceased's personal estate is then of, the christian and surname of the child who hath attained his or her age, with the christian and surnames of the deceased's other children then surviving; so if it be brothers or sisters, or children of the deceased's brothers or sisters, with the names of any two clergymen then in the neighbourhood; and hereby a commission will be obtained and the business done by the assistance of a proctor as before mentioned.—When this latter administration is obtained, it is usual for the new administrator on settling with the old, and receiving the goods unadministered, to give him a general release; a form whereof, see in page 253, N<sup>o</sup> XIV.

WHERE the deceased hath left a will in writing duly executed, and the same is intended to be proved in common form, as treated of in pages 188, 189, the executor or executors usually send up his  
or

or their christian, and surnames, with the christian, surname, and place of abode, of the deceased, the day or time on which he died; mentioning the value of his goods, chattels, and credits, with the christian and surnames of *any* two clergymen of the neighbourhood; whereupon the friend sent to, obtains a commission through a proctor, and sends to the executor, who, after taking it to the clergymen and making an affidavit similar to the oath contained in page 190, returns it signed by one of the clergymen to his friend, with the deceased's will annexed; and the same being delivered to the proctor he generally procures the probate in the course of 3 or 4 days after, and thereon is paid for the whole business such sum as may be perceived by what is mentioned in pages 191, 192.

IF a will is not properly executed and attested by witnesses; where the deceased wrote the same himself, before it can be proved in the ecclesiastical court, it is requisite that his hand-writing be proved by an affidavit of two disinterested persons; or if another person wrote it, that the writing or will produced is the will of the deceased. And if there should be material interlineations or alterations made in a will not of the testator's own hand writing, an affidavit is also required of some person to prove that such were made by the testator's direction. And under such circumstances as those, the will should be sent up in the first instance with the clergymen's names, mentioning the time of the deceased's death, and the value of his goods, chattels, and credits; and thereby the proctor will be informed how to proceed with respect to the commission, and when the same is obtained he will deliver it with the will annexed to his employer, who sending it to the executor has the same returned, signed by one of the clergymen, and then delivers it to the proctor, of whom he receives the probate to send down in the course of a few days after. But here we must observe there will be considerably more expence than when the will is properly executed;  
subscribed

subscribed by witnesses, and fairly wrote (as it should be) in one hand-writing, without interlineations or alterations, or as few as possible of which, and as a few may sometimes almost unavoidably happen, it is well to make mention in the attestation, before the witnesses subscribe their names thereto; as in N<sup>o</sup> V. pages 231, 232. Concerning a will not properly executed, we have taken notice in page 154.

WHEN it is requisite for administration to be granted with the will annexed, as treated on in pages 192, 193, 194; the deceased's will should be sent up, and mention made of the day or time on which he died, and the value of his goods, chattels, and credits, with the names of *any* two clergymen in the neighbourhood; and here attention must be had to the kind of administration wanted; as whether it be during the minority of an infant or infants, or where a testator hath died without naming any executor, or named incapable persons, or if it be where all the executors named refuse to act. Either of which cases describe; and if it be during the minority of an infant or infants, who were appointed executors; mention his or their christian, surnames, and ages; the christian, surname, relationship to the deceased, and description of the person applying. And in either of the other cases, mention the christian and surname of the person who applies, and describe him as relation, devisee, &c. of the deceased, [*as may be the case*]. So hereby a proctor may be enabled to obtain the commission and administration for his employer.

THUS having laid down the method of proceeding to obtain administration and probate of a will by commission, we may now observe that, when instructions are sent up for a proctor to obtain a commission by, care should be taken that the names, &c. sent up be spelled right; for although false spelling will not render the commission void, yet it will increase the expence thereof.



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# E R R A T U M.

Page 232, in the attestation, after the word, interlined, *del*, as  
and for his last will and testament.



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T H E

L A W ' s   D I S P O S A L

O f a P E R S O N ' s   E S T A T E ,

W H O   D I E S   W I T H O U T   W I L L   O R   T E S T A M E N T .

---

C H A P .   I .

*Of Intestates. Of Administration ; why it should be obtained, and who are entitled thereto. By whom it is to be granted. The Method of obtaining it, and the Expence thereof. How the same may be revoked.*

S E C T I O N   T H E   F I R S T .

O F   I N T E S T A T E S .

**T**H E R E are divers kinds of intestates. One that makes no will at all ; another that makes a will and executors, and they refuse to act : in this case he dies *quasi intestatus*<sup>a</sup> ; that is, as if intestate. But this latter is not that kind of intestacy here intended : for in this case the law does not dispose of the estate ; as here administration is to be granted *cum testamento annexo*, that is, with the testament annexed ; and then the duty of the administrator is very little different from that of an executor<sup>b</sup> ; he being to adhere to the testament, which is to be his guide in disposing of the estate and effects of the deceased. But as the former is that which is here intended, we shall briefly take notice of the distinction Wentworth makes between a will and a

<sup>a</sup> 2 Inst. 397.

<sup>b</sup> Black, Com. 2 V. 504.

testament, without entering into a minute discussion of intestacy, which would be foreign to this subject, and therefore shall be reserved for the latter part of this work<sup>c</sup>; it being our present intention to shew how the law disposes of a person's estate in case he dies wholly intestate, and not to point out the various kinds of intestacy.——It is called a will, says Wentworth, when there is an executor appointed; and when there is none, it is termed a testament. So there may be a will where there is no testament, and a testament where there is no will. And where a testament is made without an executor being named, this testament is to be adhered to as a guide to the administrator in disposing of the estate, in the same manner, as where one or more executors are named, and they refuse to act<sup>d</sup>.

## SECTION THE SECOND.

### OF ADMINISTRATION: WHY IT SHOULD BE OBTAINED, AND WHO ARE ENTITLED THERETO.

**A**N administrator cannot act before letters of administration are granted to him; he not being like an executor, who may do many acts before he proves the will; but an administrator may do nothing till letters of administration are issued<sup>e</sup>. When letters of administration are issued, the person deputed by the ordinary, that is, he who grants the letters of administration, to administer the intestate's goods, shall have an action to demand and recover, as executor, the debts due to the intestate<sup>f</sup>.

If the deceased die wholly intestate, without making either will or testament, then general letters of administration must be granted by the ordinary to such administrator as the statutes of 31 Edw. III. c. 11. and 21 Hen. VIII. c. 5. direct; and in consequence of which the ordinary is compellable to

<sup>c</sup> See Page 170.

<sup>e</sup> Black. Com. 2 V. 507.

<sup>d</sup> Went. Off. Exec. 2.

<sup>f</sup> Stat. 31 Edw. III. c. 11.

grant administration of the goods and chattels of the wife to the husband, or his representatives<sup>z</sup>, that is, his executors or administrators, who, if the husband dies before administration taken, will be entitled in equity, and not the wife's next of kin<sup>b</sup>. And that the administration of the wife's goods of right appertaineth to her husband, is confirmed by the statute of the 29 Car. II. c. 3. which enacteth, that the statute of the 22 & 23 Car. II. c. 10. (commonly called the statute of distributions) shall not extend to the estates of femes-covert that shall die intestate; but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same<sup>1</sup>. But if the wife was executrix to another; then, as to the goods which she had in that capacity, administration must be granted to the testator's next of kin<sup>c</sup>.

By the statutes of Edward the Third and Henry the Eighth, before mentioned, the ordinary is compellable to grant administration of the husband's effects to the widow, or next of kin. But he may grant it to both, or either, at his discretion<sup>1</sup>. For, it being moved for a mandamus<sup>m</sup> to the

<sup>z</sup> Black. Com. 2 V. 504.

<sup>b</sup> Cro. Car. 106. 1 P. Will. 381.

<sup>3</sup> Atk. 526.

<sup>d</sup> The husband has seldom occasion for taking administration on the death of his wife, unless it is to recover something that appertained to the wife, which she was not possessed of during the marriage; for immediately on the marriage all the chattels-personal she is possessed of vest in her husband, and her chattels real he may make his own if he will. What these are, see p. 28, 29.

<sup>k</sup> 3 Salk. 21.

<sup>1</sup> Black. Com. 2 V. 496. 504.

<sup>m</sup> Mandamus is a writ, whereby a command issues in the King's name, from the court of King's Bench, directed to any person, corporation, or inferior court of judicature, within the

King's dominions, requiring them to do some particular thing therein specified which appertaineth to their office and duty. And this writ may be obtained for an infinite number of other purposes. It is grounded on a suggestion, by the oath of the party injured of his own right and the denial of justice. Black. Com. 3 V. 110.—The matter for which this writ is obtained must be laid before the court. 3 New Abr. 528. And as the matter must be laid before the court, it must be in term time, when the court is sitting. The manner of laying it before the court is by counsel, who moves the court on the oath of the injured party; which oath is delivered to him in writing, with his instructions, as previously drawn up by an attorney.

#### 4 *The DISPOSAL of a PERSON'S ESTATE*

official of the bishop of Gloucester, to commit administration to the widow of an intestate, the court observed, that would be to deprive the ordinary of his election, in granting it to her, or the next of kin; and therefore ordered the mandamus to be taken generally, to grant administration of the goods of the intestate<sup>n</sup>.—The ordinary may grant administration, either jointly or separately; for he may grant several administrations of several parts of the goods of the intestate<sup>o</sup>; as where a man died intestate, leaving a wife and a brother, the ordinary had granted administration of some particular debts to the brother, and the residue to the wife. It was agreed by the court, that the ordinary might grant administration to the brother, as to part, and to the wife for the rest, in which case neither could complain; since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100l. the ordinary cannot grant administration of 50l. to one person, and 50l. to another, because this is an entire thing<sup>p</sup>.

As concerning the intestate's next of kin: Among the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases<sup>q</sup>. The nearness of degree shall be reckoned according to the computation of the civil, and not of the canon law<sup>r</sup>; and therefore, where there be both parents and children of the deceased, the children are entitled to the administration in preference to the parents, though both are in equal degree of kindred; and on failure of children, the parents are entitled<sup>s</sup>. Then follow brothers, grandfathers, uncles, or nephews, (and the females of each class respectively), and lastly, cousins.—The half blood<sup>t</sup> is admitted to the administration as well as the whole: for they are of the kindred of the intestate, and only excluded from inheritances of land. Therefore the brother

<sup>n</sup> Str. 552.

<sup>o</sup> 1 Roll's Abr. 908.

<sup>p</sup> 1 Salk. 36.

<sup>q</sup> Black. Com. 2 V. 504.

<sup>r</sup> How the nearness of degree is 71. 91.

reckoned according to the Civil Law,  
see page 78.

<sup>s</sup> Black. Com. 2 V. 504.

<sup>t</sup> Who the half blood are, see page

of the half blood shall exclude the uncle of the whole blood<sup>u</sup>, and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion<sup>v</sup>. But if there is a brother and a sister of the half blood, and the sister is married, then it must be granted to the brother, and not to her and her husband; because in effect it makes the husband administrator, who is not of kin to the intestate; and if she die, the husband would still continue administrator, and so might possess himself of the whole personal estate<sup>w</sup>,

WHEN the right of administration devolves upon an infant, the ordinary is to grant administration till he arrives at the age of twenty-one; because an infant cannot, before his full age, give bond to administer faithfully<sup>x</sup>. And as such an administrator is but in nature of a curator for the infant, and has no interest or benefit in the intestate's estate but in right of the infant, it has always been held discretionary in the ordinary to whom to grant it; and therefore it hath been frequently adjudged, that he is not obliged, within the statute of Henry the Eighth, to grant it to the next of kin, either of the deceased or the infant<sup>y</sup>.—If none of the kindred will take out administration, a creditor may by custom do it. And the ordinary may, in defect of all these we have here mentioned, commit administration (as he might have done before the statute of Edward the Third, when the ordinary had the absolute disposal of intestates effects<sup>z</sup>) to such a discreet person as he approves of; or may grant him letters *ad colligendum bona defuncti*; that is, to gather up the goods of the deceased, which neither make him executor nor administrator; his only business being to keep the goods in his safe

<sup>u</sup> Black. Com. 2 V. 305.

<sup>v</sup> *Ibid*.

<sup>w</sup> 3 Salk. 21.

<sup>x</sup> Godolph. 102. 5 Co. Rep. 29.

<sup>y</sup> Hob. 251. 1 New Abr. 381.—

When a person having neither wife, page 24.

child, or kindred, dies intestate, the <sup>z</sup> 2 New Abr. 398.

usual course is for some one to procure letters patent, or other authority from the King; and then the ordinary of course grants administration to such appointee of the crown, as mentioned

custody, and to do other acts for the benefit of such as are entitled to the property of the deceased <sup>a</sup>.—If an administrator die, his executors are not administrators; but it behoveth the ordinary to commit a new administration <sup>b</sup>. Where the administration is granted to two, and one of them dies, the administration surviveth to him who is living <sup>c</sup>.

## SECTION THE THIRD.

WHERE, AND BY WHOM ADMINISTRATION IS  
TO BE GRANTED.

**T**HE applying for and obtaining administrations from improper courts, having often been detrimental to administrators; and as applications through inadvertency are too frequently made to inferior courts instead of the prerogative, it was thought expedient in our explanation preceding the contents of this work, to lay down a clear and plain method, whereby every person having occasion for applying to the prerogative court, might readily perceive in what manner he might have access thereto, when ill or living at a distance from London; and in our proceeding herewith we have referred to this section, with a view to inform the reader of the circumstances that may render such application necessary, either for obtaining administration or probate of a will, the latter whereof is to be applied for to the same court by whom the former ought to be granted, as we have shewn at the conclusion of this section.

GENERALLY the person who is to grant administration is the bishop of the diocese, or his officer, where the intestate dwelled <sup>d</sup>. And if all the goods of the deceased lie within the same jurisdiction, an administration granted by him is the only proper one; but if the deceased had *bona notabilia*, or chattels to the value of one hundred shillings, or five pounds, in two distinct dioceses; then administration must be taken out before the metropolitan of the province <sup>e</sup>. But if a man die upon a journey, the goods that he then hath about or with him shall not be as *bona notabilia*

<sup>a</sup> Went. Off. Exec. chap. 14.

<sup>d</sup> Swinb. 427.

<sup>b</sup> 1 Roll's Abr. 907.

<sup>e</sup> Black. Com. 2 V. 509.

<sup>c</sup> Cal. Talb. 127.

to cause administration to be committed in the prerogative f.—Debts owing to the intestate are *bona notabilia*, as well as goods in possession g. And they shall be *bona notabilia*, in that diocese where the bond or other specialties be, and not where the debtor inhabits h. So judgments obtained in the courts at Westminster, upon actions laid in the country, are *bona notabilia*; not where the action was laid, but where the judgment was obtained; because the record is there i. But if the debts be only by simple contract, without specialty, then they are to be esteemed *bona notabilia* in the place where the debtor is k. So a bill of exchange shall be said to be *bona notabilia* where the debtor is, and not where the bill is; for it is no specialty in law: for if the administrator pays debts upon simple contract, or suffers judgment against him, in such actions he may plead such payment or judgment in bar to an action upon a bill of exchange l.—Where one dies possessed of goods in London and Dublin, in such case the resolution seems to have been, that the archbishop of Canterbury, by his prerogative, was to grant administration of the goods in London, and the archbishop of Dublin for those in Dublin m. If one die in Ireland, and have nothing but a specialty for money, and that specialty doth lie in England, the ordinary of the diocese, within which the place is where the specialty lies, shall commit the administration; and if the ordinary of another diocese grant it, the administration is void: and therefore the case was, a merchant in Ireland was bound in an obligation of forty pounds to one J. S. in London, and the obligation was made in Ireland, but remained always in London, and the merchant died intestate in the county of Bedford in England, and a bishop of Ireland did commit the administration to one, and the archbishop of Canterbury committed it to the wife of the intestate, who had the obligation; in this case, the last administration was adjudged good: and it was there held, that the administration shall be granted by the ordinary of the place, where the specialty doth lie at the time of the death of the intestate, and not by the ordinary of the place where the debt began n. In case a person has *bona notabilia* both in

f Swinb. 438, 439.—The administration has nothing to do with real estate (a description whereof see in page 86.). And in case lands be given by will to executors for payment of debts or legacies; it seems this shall not be *bona notabilia*, although it be assets. Went. Off. Exec. 46.

g 1 Roll's Abr. 909.

h *Ibid.*

i Carth. 148.

k Went. Off. Exec. 46.

l 3 Salk. 164.

m Gibb. 472. 4 Burn's Eccles. Law. 182.

n Shep. Touch. 443.

the province of York and Canterbury, administration must be taken out before both metropolitans, if within the jurisdiction of each there are *bona notabilia* in divers dioceses; or else if in either of the provinces, the goods lay in one diocese, then administration must be taken out before the particular bishops in whose several dioceses the goods are<sup>o</sup>. Or if the deceased had goods in the jurisdiction of one metropolitan, lying in divers dioceses, and in the other, but in one diocese; then administration must be taken out before the archbishop who has jurisdiction over the divers dioceses, and before the particular bishop of the diocese<sup>p</sup>.—The granting of administration of the goods of every bishop, although he hath not goods but in his own jurisdiction, doth belong to the archbishop<sup>q</sup>.

THERE are certain peculiar ecclesiastical jurisdictions, where, by prescription, or composition, or other special title, the granting administration of the goods of such as dwell and die within those places, doth appertain to the judge of that peculiar<sup>r</sup>.—There is the court of peculiars, which is a branch of, and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed throughout the province of Canterbury, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only<sup>s</sup>.—Where one dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese; there shall be several administrations, and the archbishop shall have no prerogative, because the peculiar was first derived out of his jurisdiction<sup>t</sup>. But where one dies possessed of goods in several peculiars within the same diocese; in that case administration shall not be granted by the bishop of the diocese, but by the metropolitan; insomuch as they are exempt from ordinary jurisdiction<sup>u</sup>.

By the statute of the 4 Ann. c. 16. sect. 26. The power of granting probates of wills, and letters of administration, of

<sup>o</sup> Went. Off. Exec. 46.

<sup>p</sup> *Ibid.*

<sup>q</sup> 4 Inst. 335.

<sup>r</sup> Swinb. 427.

<sup>s</sup> Black. Com. 3 V. 65.

<sup>t</sup> Gibson, 472. Cro. Eliz. 719.

<sup>u</sup> Gibson, 472. Swinb. 440.



the goods of persons entitled to wages, for work done in her Majesty's yards and docks, is declared to be in the ordinary of the diocese; or such other persons to whom the ordinary power of probates of wills, or granting of administrations do belong, where such persons shall die; and the wages due to such persons shall not be taken to be *bona notabilia*, to found the jurisdiction of the prerogative court.

THE prerogative is grounded upon this reasonable foundation: that as bishops were formerly themselves the administrators to all intestates in their own diocese; and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority doth not extend. And it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*, besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make, in such cases, one administration serve for all v.

It has been declared, that administrations committed by the archbishop, by his prerogative, to one who did not die possessed of goods in divers dioceses, were merely void. But the more current doctrine is, that such administrations are not void, like those granted by a bishop, where are *bona notabilia*, but only voidable by sentence; because the metropolitan hath jurisdiction over all the dioceses in his province, whereas a bishop can by no means have jurisdiction in another diocese w.—It is said, that if administration be committed in a diocese where there are *bona notabilia*, though

v Black, Com. 2. V. 509.

w 4 Burn's Eccles. Law. 184.

such grant be *ipso facto*<sup>2</sup> void, yet they do not grant a new administration in the prerogative court, before they have repealed that; and in that case they shall not be prohibited<sup>3</sup>.

THUS having treated on where and by whom administration is to be granted, and herewith shewn the reasonable foundation upon which the prerogative is founded, and touched upon the doctrine of administration being void when granted by an improper court; we shall now shew in what manner persons inadvertantly applying for probates of wills, or administrations, are to be treated by the respective officers of spiritual courts when so applied to.

As it hath been the case that many have been by apparitors, both of inferior courts and the courts of the archbishop's prerogative, much distracted, by being diversly called and summoned for probate of wills, or to take administrations of the goods of persons dying intestate, and thereby have been vexed and grieved with many causeless and unnecessary troubles and expences; by Canon 92. "It is constituted and appointed, that all chancellors, commissaries, or officials, or any other exercising ecclesiastical jurisdiction whatsoever, shall at the first, charge with an oath all persons called or voluntarily appearing before them for the probate of any will, or the administration of any goods, whether they know, or (moved by any special inducement) do firmly believe, that the party deceased (whose testament or goods depend now in question) had, at the time of his or her death, any goods or good debts in any other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein the said party died, amounting to the value of 5l. And if the said person cited, or voluntarily appearing before him, shall upon his oath affirm, that he knoweth, or (as aforesaid) firmly believeth, that the said party deceased had goods or good debts

<sup>2</sup> *Ipso facto* void signifies that it is void without any decree or sentence. As in the case of a person obtaining two or more preferments in the church with cure, not qualified by dispensation,

&c. the first living is void *ipso facto*, viz. without any declaratory sentence. and the patron may present to it. Dyer, 275.

<sup>3</sup> 4 Burn's Eccles. Law, 185.

" in

“ in any other diocese or dioceses, or peculiar jurisdiction  
 “ within the said province, to the value of 5l. and parti-  
 “ cularly specify and declare the same, then shall he pre-  
 “ sently dismiss him, not presuming to intermeddle with the  
 “ probate of the will, or to grant administration of the goods  
 “ of the party so dying intestate. Neither shall he require or  
 “ exact any other charges of the said parties, more than such  
 “ only as are due for the citation, and other process had, and  
 “ used against the said parties, upon their further contumacy ;  
 “ but shall openly and plainly declare and profess, that the  
 “ said cause belongeth to the prerogative of the archbishop of  
 “ that province ; admonishing the party to prove the will, or  
 “ require administration of the goods, of the court of the said  
 “ prerogative, and to exhibit before him, the said judge, the  
 “ probate or administration under the seal of the prerogative,  
 “ within forty days next following. And if any chancellor,  
 “ commissary, official, or other exercising ecclesiastical juris-  
 “ diction whatsoever, or any their register shall offend herein ;  
 “ then let him be *ipso facto* suspended from the execution of  
 “ his office, not to be absolved or released until he have re-  
 “ stored to the party all expences by him laid out contrary to  
 “ the tenor of the premises ; and every such probate of any  
 “ testament, or administration of goods so granted, shall be  
 “ held void and frustrate to all effects of the law whatsoever.  
 “ And it is hereby further charged and enjoined, that the re-  
 “ gister of every inferior judge do, without difficulty or de-  
 “ lay, certify and inform the apparitor of the prerogative  
 “ court, repairing to him once a month, and no oftener,  
 “ what executors or administrators have been by his said  
 “ judge, for the incompetency of his own jurisdiction, dis-  
 “ missed to the said prerogative court within the month next  
 “ before ; under pain of a month’s suspension from the ex-  
 “ ercise of his office for every default therein.”

BUT it is provided that this canon, or any thing therein  
 contained, be not prejudicial to any composition between  
 the archbishop and any bishop or other ordinary, nor to any

inferior judge that shall grant any probate of testament or administration of goods to any party that shall *voluntarily* desire it, both out of the said inferior court, and also out of the prerogative. And likewise, that if any man die *in itinere*, that is, on a journey, the goods that he hath about him, at that present, shall not cause his testament or administration to be liable unto the prerogative court.

IN respect of the prerogative court, by Canon 93. "It is decreed and ordained, that no judge of the archbishop's prerogative shall cite, or cause to be cited *ex officio*<sup>a</sup>, any person whatsoever to any of the before-mentioned intents, unless he hath knowledge that the party deceased was, at the time of his death, possessed of goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein he died, amounting to the value of 5*l.* at the least: and decreed and declared, that whoso hath not goods in divers dioceses to the said sum or value, shall not be accounted to have *bona notabilia*. Always provided, that this clause here, and in the former constitution mentioned, shall not prejudice those dioceses, where, by composition or custom, *bona notabilia* are rated at a greater sum<sup>a</sup>. And if any judge of the prerogative court, or any, his surrogate, his register or apparitor, shall cite or cause any person to be cited into his court, contrary to the tenor of the premises, he shall restore to the party so cited all his costs and charges; and the acts and proceedings in that behalf shall be held void and frustrate. Which expences, if the said judge or register, or apparitor, shall refuse accordingly to pay; he shall be sus-

<sup>a</sup> It is so called from the power a person has, by virtue of an office, to do certain acts without being applied to: as a justice of peace may not only grant surety of the peace at the complaint or request of any person, but he may demand and take it *ex officio* at discretion, &c. Dalt. 270.

<sup>a</sup> The law concerning this matter is, that five pounds is the sum or value of notable goods. But where, by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered; as in the diocese of London, it is 20*l.* by composition. 4 Burn's Eccles. Law, 181.

" pended

“ pended from the exercise of his office, until he yield to  
“ the performance thereof.”

WHAT has been said under this head respecting administration, is alike applicable to wills and testaments. For regularly, he that shall have the probate of a will, in case where a man doth make a will, shall have the granting of administration of his goods and chattels in case he dies intestate<sup>b</sup>.

#### SECTION THE FOURTH.

WHAT THE PERSON, APPLYING FOR ADMINISTRATION, IS TO DO BEFORE IT IS GRANTED.

THE practice is not to issue letters of administration, until after the expiration of fourteen days from the death of the intestate; unless for special cause (as, that the goods would otherwise perish, or the like) the judge shall think fit to decree them sooner. On taking out letters of administration, the administrator takes an oath, which is usually in this form: “ You shall swear, that you believe A. B. deceased died without a will; and that you will well and truly administer all and every the goods of the said deceased, and pay his debts as far as his goods will extend; and that you will exhibit a true, full, and perfect inventory of the said goods of the deceased, and render a true account of your administration into the — court of C. when you shall be thereunto lawfully required<sup>c</sup>.” You also swear that you are the widow, son, daughter, next of kin, or creditor, [*as may be the case*] of the said A. B. and that the whole of the goods, chattels, and credits<sup>d</sup> he died possessed of, do not in value exceed the sum of l. “ So help you GOD.”

<sup>b</sup> Shep. Touch. 443.

<sup>c</sup> 4 Burn's Eccles. Law, 231.

<sup>d</sup> The administration has nothing to

do with real estate, as has already been mentioned towards the former part of the preceding section.

By the statute of the 22 & 23 Car. II. c. 10. *It is enacted, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may, upon their granting and committing of administrations of the goods of persons dying intestate, of the person or persons to whom any administration is to be committed, take sufficient bond with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, viz.*

“ THE condition of this obligation is such, that if the  
 “ within bounden A. B. administrator of all and singular  
 “ the goods, chattels, and credits of C. D. deceased, do  
 “ make or cause to be made a true and perfect inventory of  
 “ all and singular the goods, chattels, and credits of the said  
 “ deceased, which have or shall come to the hands, possession, or knowledge of him the said A. B. or into the hands  
 “ and possession of any other person or persons for him, and  
 “ the same, so made, do exhibit or cause to be exhibited into  
 “ the registry of                      court, at or before the                      day  
 “ of                      next ensuing; and the same goods, chattels,  
 “ and credits, and all other the goods, chattels, and credits  
 “ of the said deceased at the time of his death, which at any  
 “ time after shall come to the hands or possession of the said  
 “ A. B. or into the hands and possession of any other person or  
 “ persons for him, do well and truly administer according to  
 “ law; and further do make, or cause to be made, a true and  
 “ just account of his said administration, at or before the  
 “ day of                      ; and all the rest and residue of the said goods,  
 “ chattels, and credits which shall be found remaining  
 “ upon the said administrator's account, the same being  
 “ first examined and allowed of by the judge or judges for  
 “ the time being of the said court, shall deliver and pay  
 “ unto such person or persons, respectively, as the said  
 “ judge or judges, by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall  
 “ limit and appoint; and if it shall hereafter appear  
 “ that

“ that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court; then this obligation to be void, and of none effect, or else to remain in full force and virtue.”

THIS condition, as to the administering truly, according to law, is to be intended in bringing in the administrator's account, and not in paying the debts of the intestate, and therefore a creditor shall not take an assignment of the bond, and sue it, and for breach assign non-payment of a debt to him, or a devastavit committed by the administrator; for that would be endless<sup>e</sup>.—By the statute of the 1 Jac. II. c. 17. sect. 6. No administrator shall be cited into court to render an account of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate as a creditor or next of kin; nor shall be compellable to account before any ordinary or judge empowered by the act of 22 & 23 Car. II. otherwise than as mentioned by this act.—The ecclesiastical court understand no more by an account, than some account in nature of an inventory<sup>f</sup>; and the ordinary, after the administrator has exhibited an inventory, cannot compel the administrator to account, but it must be at the instance of the party (as one in behalf of a minor, or one having demand out of the intestate's estate, as a creditor or next of kin); and therefore the inventory and account are, as to the ordinary, the same thing<sup>e</sup>.

<sup>e</sup> 1 Salk. 316.

granted, see pag. 37—42.

<sup>f</sup> For more concerning the inventory, and what may be required of the administrator before administration is

§ 3 Atk. 248. For more concerning this, see pag. 61—63.

## SECTION THE FIFTH.

THE FEES AND EXPENCE OF OBTAINING THE  
ADMINISTRATION.

**S**UCH a considerable increase in the fees and expence of obtaining administration, having been occasioned by two statutes made within the course of a few years past, that the amount thereof at this time may seem almost incredible to those, who but a few years ago had administered to the estate of any deceased person ; we shall here, for the reader's information, trace the rise and progress of this increase, and in a subsequent part of our work briefly point out the net sum at this time paid for administration, and proving a will.

THE fees for administration taken by the practitioners in Doctors Commons, it is conceived, were much the same with those in other ecclesiastical courts throughout the kingdom, and nearly the same with the fees allowed to be taken by those practitioners, as settled by a jury, Nov. 19, 1734, and till the first of the two statutes above hinted at took effect, were as follows, *viz.* The whole fees for an administration under 20*l.* that is, where the goods, chattels, and credits, did not amount to 20*l.* in value ; of a sailor in the King's service, 7*s.* For an administration under five pounds in other cases, 7*s.* For an administration under 20*l.*, 1*l.* 1*s.* And under 40*l.*, 1*l.* 18*s.* For an administration above 40*l.*, 2*l.* 5*s.*<sup>h</sup>, which last mentioned sum, by divers bills, the author hereof had seen paid for administrations in the course of some years before the statute 19 Geo. III. hereafter mentioned took effect, was about 2*l.* 10*s.* including therein the stamp duty for the bond mentioned in the foregoing section, and also the several stamp duties laid on by the statutes of the 5 W. & M. c. 21. and 9 W. III. c. 25. whereby it is enacted, that for every skin or piece of vellum or parchment,



or sheet or piece of paper, on which shall be written any letters of administration (except of common seamen or common soldiers slain or dead in the service) for any estate above the value of 20*l.* shall be paid a stamp duty of 10*s.* By the statute 19 Geo. III. c. 66. if the estate, for which the latter administration was taken, amounted to 100*l.* one pound for a stamp duty was added to the 2*l.* 10*s.* which made it 3*l.* 10*s.* And if the estate amounted to 300*l.* or upwards, another pound was added, whereby the administration amounted to 4*l.* 10*s.* And by the statute 23 Geo. III. c. 58. where the estate is of, or above the value of 100*l.* there is an additional stamp duty of 20*s.* which makes the above 3*l.* 10*s.* to amount to 4*l.* 10*s.* And where the estate is of, or above the value of 300*l.* a further additional duty of 20*s.* which, added to the 2*l.* laid on by the statute 19 Geo. III. and the first additional 20*s.* laid on by this statute, make 4*l.* and this being added to the above mentioned 2*l.* 10*s.* causes the administration to amount to 6*l.* 10*s.* And where the estate is of, or above the value of 600*l.* there is a further additional duty of 20*s.* which makes the administration amount to 7*l.* 10*s.* And where the estate is of, or above the value of 1000*l.* a further additional duty of 20*s.* which makes the administration amount to 8*l.* 10*s.* And the fees and expence of proving a will in common form are about 7 or 8*s.* less than what is paid for letters of administration; that is, provided the will be very short; but if it is of any considerable length, the cost will be considerably more, as in proportion to the length thereof. But what has been said respecting these fees, must be understood to be when the administration issues of course, or without being opposed, and on personal application made for the same; for if the granting it is opposed, the expence of obtaining it will be according to the effect of the opposition, or the length such opposition may be carried to after a caveat is entered, or suit commenced. And if personal application is not made for the administration, but instead thereof a commission is issued for the administrator to administer (as is usual when the administrator is ill, or lives at a great distance from town), the

expence of a commission for an administration or proving a will is considerably more, concerning which we shall make mention in a subsequent part of this work, and there shew, as proposed, what is now the expence of obtaining administration, or proving a will, and that, either by personal application or commission <sup>h</sup>.

## SECTION THE SIXTH.

## HOW, AND FOR WHAT REASON, THE ADMINISTRATION MAY BE REVOKED.

**I**F an administration is granted, and afterwards a will is produced and proved, the administration shall be revoked <sup>i</sup>.—The ordinary cannot repeal an administration at his pleasure <sup>k</sup>.—In the case of Sir George Sands, the father administered to his son, and afterwards a woman, pretending to be the son's wife, sued for a repeal; but a prohibition <sup>l</sup> was granted, because the ordinary had an election to grant it either to the father or wife, and by granting it to the father, had executed his power <sup>m</sup>. But where a feme-covert, that is, a married woman, died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied; because in this case the ordinary had no power, or election, to grant it to any person but the husband <sup>n</sup>.

THE rule seems to be, that an administration may be repealed, although not arbitrarily, except where there shall be just cause for so doing; as if the administrator should

<sup>h</sup> See pag. 191, 192.

<sup>i</sup> 2 Roll's Abr. 907. See more as to this, pag. 47.

<sup>k</sup> Swinb. 381.

<sup>l</sup> A *prohibition*, is a writ issuing properly out of the court of King's Bench, being the King's prerogative writ; but for the furtherance of justice, it may now also be had in some cases out of the court of Chancery, Common Pleas,

or Exchequer, directed to the judge and parties of a suit in any inferior court. Black. Com. 2 V. 112. It is a writ to forbid any court to proceed in any cause there depending, on suggestion that the cognizance thereof belongeth not to the court. Fitzh. Nat. Brev. 39.

<sup>m</sup> Raym. 93.

<sup>n</sup> 3 Salk. 22.—See pag. 3.

become lunatic, or the like ; of which the temporal courts are to judge. So if the next of kin, at the death of the intestate, happen to be incapable of administering, by reason of attain or excommunication, and the ordinary commits it to another ; if he afterwards becomes capable, the ordinary may repeal the first administration, and commit it to the next of kin \*. And the same is much more to be said where the administration was undue *ab initio*, that is, from the beginning, whether as granted to any other than the next of kin, or granted by an incompetent authority, or in an irregular manner, without citing those who ought to have been cited †.

WHERE a man died intestate, leaving a wife and a sister, the sister, upon the common oath, that she believed he died intestate, without wife or children, obtained administration. And in a suit to repeal it, as obtained by surprise, it appeared to be the custom of the court, never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had an opportunity to make the election which the statute of the 21 Hen. VIII. c. 5. gives him ; that it was incident to every court, to rectify the mistakes they were led into by misrepresentation of the parties ; that if there were no surprise (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted ; but there was a plain surprise, and therefore they denied a prohibition †. — It is said, that an administration may be repealed, without any sentence of revocation to be given in any spiritual court, or otherwise ; as by granting a new administration †.

\* 4 Burn's Eccles. Law, 236.

† *Ibid.* 237.

† *Ibid.*

† *Ibid.*

WHERE the administrator, after many goods administered, had his administration revoked, and it was committed to B. who sued the first administrator for goods unduly administered; it was held, that there was no remedy but in *Chancery*. But it is conceived in such a case as this, the second administrator might maintain an action at law against the first, for money had and received, or trover for any goods remaining in his possession\*.—See more concerning administration revoked, p. 50.

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## C H A P. II.

### *Of the Administrator.*

#### SECTION THE FIRST.

#### HIS POWER BY VIRTUE OF THE ADMINISTRATION.

**H**AVING seen who are entitled to the administration, and of whom the same is to be obtained; with an account of the fees and expence of obtaining it, and how the same may be revoked; we may now consider the power the administrator has, by having the administration thus granted to him. Somewhat of this we have already seen, as that he cannot act before it is granted to him, and that after it is, he may bring actions as an executor may†.—We have seen also the reason why administration should be thus granted; as that the bishops were formerly the administra-

\* Jac. Law Dict. 10 edit. tit. Ad-  
ministrator. † Page 2.

tors of the goods and chattels of persons dying intestate<sup>u</sup>, and this continued to be the case till the statute of the 31 Edw. III. before mentioned<sup>v</sup> was made<sup>x</sup>. But now administrators are put upon the same footing with regard to suits, and to accounting, as executors appointed by will<sup>y</sup>.—Where there be two administrators, and one dies, the administration survives, and doth not cease<sup>z</sup>: it not being like a letter of attorney to two, where by the death of one the authority ceaseth; but is rather an office; and administrators are enabled to bring actions in their own names: they come in the place of executors, and therefore the office survives<sup>a</sup>. But if there is but one administrator, and he dies, his executors are not administrators, but it behoves the ordinary to commit a new administration<sup>b</sup>. When, an administrator hath judgment, and dies, his executors (as such) may not sue execution of the judgment; for none shall have execution of this judgment, but he who shall be subject to the payment of the debts of the first intestate<sup>c</sup>.——If there be two or more administrators, one of them cannot sell goods, or release debts, without the others joining; for they have but one authority given them by the bishop over the goods: which authority, being given to many, is to be executed by all of them joined together<sup>d</sup>. But it is otherwise in respect to co-executors; these being in law but one person, therefore the act of one is the act of them all, and the possession of one is accounted the possession of all<sup>e</sup>.

An administrator, by virtue of his administration, hath interest in all the chattels, real and personal, of the intestate, and all the goods and chattels, either in possession or action<sup>f</sup>, in like manner as an executor in the goods of the testator deceased. And all those goods and chattels which belonged

<sup>u</sup> Page 9.

<sup>v</sup> Page 2.

<sup>x</sup> Black. Com. 2 V. 495.

<sup>y</sup> *Ibid.* 496.

<sup>z</sup> Page 6.

<sup>a</sup> 2 Vern. 514.

<sup>b</sup> Page 6.

<sup>c</sup> 5 Co. Rep. 9.

<sup>d</sup> Lord Bacon's Tracts, 162. 1 Atk. 460.

<sup>e</sup> Swinb. 328.

<sup>f</sup> For the particulars of these, see p. 28.

to the intestate at the time of his death, and which came to the hands of the administrator, shall be *assets*, or sufficient goods and chattels, to make him chargeable to creditors, as executors are to creditors and legatees. But before they come to his hands he is not chargeable<sup>z</sup>, as we shall see more of hereafter<sup>h</sup>. — An executor or administrator shall regularly charge others for any debt or duty due to the deceased, as the deceased himself might have done; and the same actions the deceased might have had, the same actions, for the most part, the executor or administrator may have also. But an executor or administrator shall not charge another, or have any action against him for a personal wrong done to the testator, when the wrong done to his person, or that which is his, is of that nature for which damages only are to be recovered: and therefore an executor or administrator cannot sue another for beating or wounding of the deceased<sup>i</sup>.

IN actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is *actio personalis moritur cum persona*, that a personal action dies with the person; and it never shall be revived, either by or against the executors, or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But in actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by, the executors or administrators; being indeed rather actions against the property, than the person, in which the executors, or administrators, have now the same interest that the testator or intestate had before<sup>k</sup>.

<sup>z</sup> Wood's Inst. new edit. 339.

<sup>i</sup> Shep. Touch. 459.

<sup>h</sup> Page 46, 47.

<sup>k</sup> Black. Com. 3 V. 302.

By the statute of the 31 Edw. III. before mentioned, administrators shall have an action to demand and recover, as executors, the debts due to the intestate. So if a man take from the executor or administrator the goods of the deceased; for this they must bring their action at common law; for they cannot sue for the goods of the deceased in a court ecclesiastical<sup>1</sup>. And tenants may be sued at the common law by executors or administrators for rent behind, and due to the testator or intestate in his lifetime, or at the time of his death; and they may for the same distrain the land charged with the rent<sup>m</sup>; and where the testator or intestate is tenant for life only, his executors or administrators may have an action at law for rent that did not become due till the death of such testator or intestate, as will be shewn after we have pointed out some particular rents that, being due to the testator or intestate in his lifetime, may be obtained by the executors, or administrators, by action at law or distress.

By the statute of the 32 Hen. VIII. c. 37. sect. 1. after reciting, that by the order of the common law, the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of rent-services, rent-charges, rent-secks, and fee-farms, had no remedy to recover such arrears of the said rents or fee-farms as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease: it is enacted, that the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of rent-services, rent-charges, rent-secks, and fee-farms, unto whom any such rent or fee-farm be due, shall have an action of debt for such arrears against the tenants who ought to have paid in the lifetime of their testator, or against their executors or administrators; or may distrain for the arrears on the land, or other hereditaments chargeable therewith, so long as the lands, or other hereditaments, con-

<sup>1</sup> Swinb. 18. 10 Mod. 21.

<sup>m</sup> Swinb. 18.

tinue in the seisin or possession of the tenant in demesne; who ought immediately to have paid the rent or fee-farm, or the seisin, or possession of any other person claiming only from the same tenant by purchase, gift, or descent, in like manner as their testator might have done.

TENANTS in fee-simple, fee-tail, or for term of life, are those who hold any messuages, lands, or tenements, in fee-simple, fee-tail, or for term of life<sup>n</sup>; and as they may hold any messuages, lands, or tenements, in this manner, so they may rent-service, rent-charge, rent-seck, and fee-farm or fee-farm rent; which are called incorporeal hereditaments, as being a right issuing out of a thing corporate, though not the thing itself, but something collateral thereto, which may be lands or houses<sup>o</sup>. *Rent-service* is so called, because it hath some corporeal service incident to it, as at the least fealty, or the feudal oath of fidelity. For, if a tenant holds his land by fealty, and ten shillings rent; or by service of plowing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service<sup>p</sup>. A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be *arrear*, or behind, it shall be lawful to distrain for the same. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a *rent-charge*; because in this manner the land is charged with a distress for the payment of it<sup>q</sup>. *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress<sup>r</sup>. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of the reservation: for a grant of lands,

<sup>n</sup> Black. Com. 2 V. 59.

<sup>o</sup> *Ibid.* 20.

<sup>p</sup> *Ibid.* 41.

<sup>q</sup> *Ibid.*

<sup>r</sup> *Ibid.*



reserving so considerable a rent, is indeed only letting lands to farm in fee-simple, instead of the usual methods for life or years\*.

THE word *demefne*, or as it is sometimes termed, *demeine*, or *demain*, is oft-times used for a distinction between those lands that the lord of the manor hath in his own hands, or in the hands of his lessee demised at a rack-rent, and such other lands appertaining to the manor which belong to free or copy-holders. *But the tenant in demefne* before mentioned, signifies the person seised or possessed of the inheritance.

By sect. 2. of the statute last mentioned, it is provided, that the same shall not extend to any manor or lordship in Wales, whereof the inhabitants have used to pay to every lord or owner thereof, at his first entry into the same, any sum for the redemption and discharge of all duties and penalties, wherewith the inhabitants were chargeable to any of the lord's ancestors.

SECT. 3. If any man shall have, in right of his wife, any estate in fee-simple, fee-tail, or for term of life, in any rents or fee-farms, and the same be due and unpaid in the wife's life; the husband, after the death of his wife, his executors and administrators, shall have action of debt for the arrears, or may distrain for the same, as he might have done if his wife had been living.

SECT. 4. If any person shall have any rents or fee-farms, for term of life of any other person, and the same be due and unpaid in the life of such other person, and he die; he to whom the same was due, his executors or administrators, may have an action of debt against the tenant *in demefne*, who ought to have paid the same when it was first due, his executors and administrators; or may distrain for the same upon such lands and tenements out of which

\* Black. Com. 2 V. 43. The learned author of the Notes on Co. Litt. says, the true meaning of fee-farm, is a perpetual farm or rent; the name being founded on the perpetuity of the rent or service; not on the *quantum*. Co. Litt. 144. Note 5. 13 edit.

the said rents or fee-farms were issuing and payable ; in like manner and form as he might have done, if such person, by whose death the aforesaid estate in the said rents and fee-farms was determined and expired, had been in full life.

HENCE we may perceive that executors and administrators, by action at law, or distress, are enabled to obtain rent which was due to their testator or intestate ; and as to persons who hold estates for term of life only, usually termed tenants for life, the executors and administrators of whom, are now enabled to recover, by an action at law, rent which did not become due in the lifetime of their testator or intestate ; and as concerning those tenants for life, mention having lately been made, and in different parts of this work divers of them described, whereto we shall refer for a further description of them<sup>1</sup> ; here we may observe that lessees of tenants for life, before the making of the statute we are about to mention, had at the common law a most unreasonable advantage ; for, at the death of the lessors, these under tenants, the lessees might if they pleased quit the premises and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent<sup>2</sup>. To remedy which by statute 21 Geo. II. c. 19. (wherein it being recited, that where any lessor, or landlord, having only an estate for life, in lands, tenements, or hereditaments demised, happened to die before or on the day on which any rent was reserved or made payable, such rent, or any part thereof, was not by law recoverable by the executors or administrators of such lessor or landlord ; nor was the person in reversion entitled thereunto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life ; of which advantage had been often taken by the under-tenants, who thereby avoided paying any thing for the same)<sup>3</sup> ; it is enacted, that where any tenant for life shall happen to die before

<sup>1</sup> Tenants for life are those who hold any messuages, lands, or tenements, for term of life, p. 24. Those may be created by deed or grant, p. 28. And tenants by the curtesy of England described p. 94. and tenants in dower p. 96. may be termed tenants for life.

<sup>2</sup> 10 Co. Rep. 127.

or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life, shall, in an action upon the case, recover of such tenant or under-tenants of such lands, tenements, or hereditaments; if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion, of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances.

To the end that a due regard be had to creditors, by the statute of the 22 & 23 Car. II. c. 10. called the statute of distributions, as was mentioned in the second section of the foregoing chapter; it is enacted, that no distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death. — An administrator, as well as an executor, is allowed, among debts of equal degree, to pay himself first, by retaining in his hands so much as his debt amounts to. So if a person indebted to another makes his creditor or debtee executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself, as representative of the deceased, to recover that which is due to him in his own private capacity: but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else by being made executor he would be put in a worse condition than all the rest of the world besides; for, as he can commence no suit, he must be paid the last of any, and of course must lose his debt in case the estate of the testator should prove insolvent, unless he be allowed to retain it.

But

But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion <sup>v</sup>.—The power the administrator has, in favouring and preferring creditors in the course of paying debts, will be seen hereafter <sup>x</sup>; together with some other powers he has vested in him <sup>y</sup>.

## SECTION THE SECOND.

## THE PARTICULARS OF WHAT THE ADMINISTRATOR IS INTERESTED IN, BY VIRTUE OF HIS ADMINISTRATION.

**H**AVING shewn, that the administrator, by virtue of his administration, hath interest in all the chattels, real and personal, of the intestate, and all the goods and chattels either in possession or action <sup>z</sup>; we come now to consider what these are in particular.

**CHATTELS** comprehend all goods, moveable and immoveable; except such as are in the nature of freehold or parcel of it; and this word by the common law extends to all moveable and immoveable goods. But estates of inheritance <sup>a</sup>, or freehold <sup>b</sup>, cannot by the common law be

<sup>w</sup> Black. Com. 3 V. 18.

<sup>x</sup> Pag. 53, 54, 56, 57, 58.

<sup>y</sup> Pag. 43, 44.

<sup>z</sup> Pag. 21.

<sup>a</sup> For more particulars concerning estates of inheritance, see pag. 86.

<sup>b</sup> Estates of freehold are either of inheritance or not of inheritance, and these not of inheritance are but for life only. Estates of freehold, not of inheritance, may be created by deed or grant; as where a lease is made of lands or tenements to a man to hold for the term

of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur autre vie*. Black. Com. 2 V. 104. 120.—A lease for 99 years, determinable upon a life or lives, is not a lease for life to make a freehold; but a lease for years, or chattel determinable upon life or lives, and an estate for 1000 years is not a freehold, or of so high a nature as an estate for life. Co. Litt. 46. termed

termed goods and chattels. *Chattels* are either personal or real. *Personal*, as household-stuff, goods and wares in a shop; carts, ploughs, horses, oxen, sheep, and the like: and these are called personal in two respects; one because they belong immediately to the person of a man; the other, for that being any way injuriously with-held from him, he hath no other remedy to recover them but by personal action. *Chattels-real*, are such as either appertain, not immediately to the person, but to some other thing by way of dependency; as a box with charters of land, or such as are issuing out of some immoveable thing; as a lease, or rent for term of years: and chattels-real concern the reality, lands and tenements, interest in advowsons, in statutes merchant, and the like<sup>c</sup>. But fishes in a pond, conies in a warren, deer in a park, pigeons in a dove-house, where the testator or intestate had the inheritance, or but for life, in the pond, warren, park, and dove-house, are not chattels at all, nor go to the executor or administrator; but to the heir with the inheritance: and therefore they are not to be put in the inventory of the goods and chattels of the party deceased. But if the testator or intestate have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to the executors or administrators; and though they were not tame, yet if they were kept alive in any room, cage, or such like place: so fish in a trunk; also young pigeons, though not tame, being in the dove-house, and not able to fly out<sup>d</sup>. Also hounds, greyhounds, spaniels, and the like, as they may be valuable, and may serve not only for delight, but for profit, shall go to the executors or administrators<sup>e</sup>. And they shall have all leases for years, though they may be for 1000 years<sup>f</sup>, and all lands extended on any judgment, statute, or recognizance, and all arrears of rent due at the death of the testator or intestate<sup>g</sup>, the latter whereof being treated on in the preceding section. And they shall have all estates *pur auter vie*, that

<sup>c</sup> Co. Litt. 118.

<sup>d</sup> 4 Burn's Eccles. Law, 240.

<sup>e</sup> *Ibid.*

<sup>f</sup> Fitzh. Nat. Brev. 120.

<sup>g</sup> 4 Burn's Eccles. Law, 242. Law of Test. 341.

is, estates held during the life of another, as before mentioned. These being distributable by the statute of the 14 Geo. II. c. 20. shall, where a man dies intestate, and they were not made to him and his heirs, be distributed in the same manner as his personal estate; but it is otherwise if made to the intestate and his heirs. For which see more hereafter, p. 49.

CORN sown will also go to the executor or administrator, and not to the heir, so also will hops, though not sown, if planted, and saffron and hemp<sup>h</sup>. This being what is usually stiled emblements, the doctrine of which extends not only to corn sown, but to roots planted, or other annual artificial profit<sup>i</sup>, as clover, saint-foin, and the like, which was sown by the deceased<sup>k</sup>. But it is otherwise of fruit-trees, grafs, and the like; which are not planted annually at the expence and labour of the tenant, but are either the permanent or natural profit of the earth<sup>l</sup>. So these latter go to the heir, and not to the executor or administrator. And Mr. Wentworth thinks, that roots in gardens, as carrots, parsnips, turnips, skirrets, and such like (which he says may be of value in gardens about London, and some great towns), shall not go to the executor, but to the heir; because they cannot be taken without digging and breaking the soil<sup>m</sup>. But it seems very clear by Lord Coke<sup>n</sup>, and Sir William Blackstone<sup>o</sup>, that these shall go to the executor or administrator; and not to the heir.

IF a man seised for life, or in fee, or tail, in his own right, or in the right of his wife, and sows the ground with corn, but dies before it is ripe, his executors or administrators shall have it, and not the wife or heir: but grafs ready to be cut for hay, apples, pears, and other fruit on the trees, shall not go to the executors or administrators. And the reason of the dif-

<sup>h</sup> 4 Burn's Eccles. Law, 242.

<sup>i</sup> Black. Com. 2 V. 123.

<sup>k</sup> 4 Burn's Eccles. Law, 242.

<sup>l</sup> Black. Com. 2 V. 123.

<sup>m</sup> Went. Off. Exec. 62.

<sup>n</sup> Co. Litt. 55.

<sup>o</sup> Com. 2 V. 122.

ference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth. And if the wife had a lease for years, as executrix; and the husband sows the ground with corn, and dies before it is ripe, the corn shall go to his executors *or administrators*, or at least, so much as is more than the yearly rent of the land: but if the husband and wife were joint-tenants of the land, she shall have the corn and not his executors<sup>p</sup>. And if a parson sows his glebe land, and dies before severance, and after his successor is admitted, instituted, and inducted, before the corn is cut, it shall go to the executors or administrators of the deceased, who must pay tithes thereof to the successor<sup>q</sup>.

THINGS that are affixed to the tenement, and are made parcel of the freehold, belong to the heir, and not to the executor *or administrator*; as the glass annexed to the windows of the house, which is parcel of the house, and shall descend as parcel of the inheritance to the heir, and the executors *or administrators* shall not have it. And although the lessee himself, at his own cost, cause the glass to be put into the windows, yet, the same being parcel of the house, he cannot take it away afterwards, without danger of punishment for waste. Neither is there any material difference in law, whether the glass was annexed to the window with nails, or in any other manner, either by the lord or by the tenant; for being once affixed to the freehold, the same cannot be removed by the lessee, but shall belong to the heir, and not to the executors *or administrators*<sup>r</sup>. So in respect of wainscot, this being annexed unto the house, either by the lessor or by the lessee, is parcel of the house. And there is no difference whether it be affixed with great nails or little nails, or by screws or irons thrust through the posts or walls of the house; for howsoever it be affixed, either in manner

<sup>p</sup> Law of Test. 342.

<sup>r</sup> Swinb. 421.

<sup>q</sup> 4 Burn's Eccles. Law, 243.

aforesaid,

aforesaid, or in any other manner, it is parcel of the freehold; and if the executors or administrators shall remove it, they are punishable for the same<sup>s</sup>: and not only glass and wainscot, but any other such like thing affixed to the freehold, or to the ground, with mortar and stone; as tables dormant, leads, mangers, and such like; these also belong to the heir, and not to the executor or administrator<sup>t</sup>. As do also millstones, anvils, doors, keys, window-shutters; none of these being chattels, but parcel of the freehold, or thereto pertaining, shall not go to the executors<sup>u</sup> or administrators.

AN executor taking away a furnace which was set up in the middle of a house, and not fixed to any wall, the heir brought an action of trespass against him, and it was adjudged for the heir, that this should go as part of the freehold and inheritance to the heir. But in the case of *Day and Austin*, Walmley said, that Lord Dyer's opinion was, that where the furnace is not affixed to the wall, the lessee might, within his term, take it away; but not if it was fixed to the wall, for there it would strengthen the house<sup>w</sup>.—Pictures and glasses, though, generally speaking, not part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put up, shall go to the heir; for the house ought not to come to the heir maimed or disfigured<sup>x</sup>. But in the case of *Harvey and Harvey*, M. 14 Geo. II. in trover by the executor against the heir, it was held by chief justice Lee, that hangings, tapestry, and iron backs to chimneys, belonged to the executor; who recovered accordingly against the heir. And the law seems now to be held not so strict as formerly; and if these things can be taken away without prejudice to the fabric of the house, it seems that the executor or administrator shall have them; as

<sup>s</sup> Swind. 421.

<sup>w</sup> Law of Test. 342.

<sup>t</sup> *Ibid.*

<sup>x</sup> *Ibid.*

<sup>u</sup> Went. Off. Exec. 61.



tables, although fastened to the floor ; furnaces, if not made part of the wall, grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise <sup>y</sup>.

In the case of *Lawton and Lawton*, 1743, the question was, whether a fire-engine, set up for the benefit of a colliery by a tenant for life, shall be considered as personal estate, and go to the executor ; or fixed to the freehold, and to go to a remainder man <sup>z</sup>. For the plaintiff (who was a creditor of the tenant for life) evidence was read, to prove that the fire-engine was worth, to be sold, 350*l*. and that it is customary to remove fire-engines. And it was urged, that the testator had died greatly in debt ; and it would be hard, when he had been laying out his creditors money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place. And it was compared to the case of a cyder mill, which is let in very deep into the ground and is certainly fixed to the freehold ; and yet lord chief baron Comyns, at the assizes at Worcester, upon an action of trover brought by an executor against the heir, was of opinion, that it was personal estate, and directed the jury to find for the executor. And lord chancellor Hardwicke, on the question of the fire-engine, whether it should be considered as personal estate, and consequently applied to the increase of assets for payment of debts, says, it appears in evidence, that in its own nature it is a personal moveable chattel, taken either in part or in gross before it is put up. But then it is insisted, that fixing it, in order to make it work, is properly an annexation to the freehold. In the old cases they go a great way upon the annexation to the freehold ; and so long ago as Henry the seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that

<sup>y</sup> 4 Burn's Eccles. Law, 244.

<sup>z</sup> A remainder man, is he who has the estate by virtue of some limitation, made either by will or deed. As if a man seised in fee simple deviseth or granteth lands to A for life, and after the

determination of A's estate for life, limiteth it to B and his heirs for ever. Here A is tenant for life, and B a remainder man in fee ; further mention whereof is made in the appendix to this work, page 242.

time, the general grounds the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public, to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done. Coppers, and all sorts of brewing vessels, cannot possibly be used, without being as much fixed as fire-engines; and in brew-houses especially, pipes must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for convenience of trade, landlords will not be allowed to retain them. The old rules of law have been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder man. But even in these cases, it admits the consideration of public expediency for determining the question; and after making some more observations on the case, lord Hardwicke says, upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for increase of assets. And decreed accordingly <sup>a</sup>.

THERE are some goods and personal chattels called heir-looms, which, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor or administrator of the last proprietor; and these are generally such things as cannot be taken away without damaging or dismembering the freehold <sup>b</sup>. — If a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir; it seemeth that these, although no part of the freehold, shall go to the heir, and not to the executor <sup>c</sup>; and that if a man deviseth these away by his will, this devise is void <sup>d</sup>. — By special custom in some places, carriages, utensils, and other household implements, may be heir-looms; but such custom

<sup>a</sup> 3 Atkyns, 13.    <sup>4</sup> Burn's Eccles.

<sup>c</sup> 4 Burn's Eccles. Law, 247.

Law, 244.

<sup>d</sup> Co. Litt. 185.

<sup>b</sup> Black. Com. 2 V. 427.

must be strictly proved<sup>c</sup>.—Other personal chattels there are, which descend to the heir in nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other ensigns of honour, suited to his degree. In this case, although the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson, or any other, take them away or deface them, without being liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig or disturb it: and if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral<sup>f</sup>.

CHARTERS and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor or administrator<sup>e</sup>. But as to the chests, *Rollé* makes a distinction, and saith, if the writings which concern the inheritance are in a chest, the executor shall have the chest, and the heir the writings. But if the chest be shut, the heir shall have the chest also; if it be not shut, the executor shall have the chest<sup>h</sup>. The author of the Law of Testaments observes, that this distinction seemeth not to be well

<sup>c</sup> Black. Com. 2 V. 428.

<sup>f</sup> *Ibid.*

<sup>e</sup> *Ibid.*

<sup>h</sup> 1 Roll's Abr. 915.

taken; for if it be a box intended for the keeping of the deeds, the heir ought to have it, whether locked or open: on the other hand, if it be a box designed for other use, as for keeping linen, it cannot be said to be appurtenant to evidences, although some be in it, for so may other things also; or perhaps it may be a chest or cabinet of great value, and this he says, surely shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts<sup>i</sup>.

BESIDES these things that are in the nature of heir-looms, there are some other goods and personal chattels that may not go to the executors or administrators; as, *paraphernalia*, which our law uses to signify the apparel and ornaments of the wife, suitable to her rank and degree; and which she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferable to all other representatives: and the jewels of a peeress usually worn by her, have been held to be *paraphernalia*. And the husband cannot by will devise from his wife such ornaments and jewels; though during his life, perhaps, he hath the power (if unkindly inclined to exert it) to sell them or give them away. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons, except creditors, where there is a deficiency of assets. And her necessary apparel is protected even against the claim of creditors<sup>k</sup>. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. If the husband delivers his wife a piece of silk to make a garment, and dies, although it was not made into a garment in the life of the husband, yet the wife shall have it, and not the executors of the husband; but against the debtor of the husband, the wife shall have no more apparel

<sup>i</sup> Law of Test. 343.

<sup>k</sup> Black. Com. 2 V. 435.

than is convenient<sup>1</sup>.—Where the question to be decided was, whether *paraphernalia* should be liable to the payment of simple contract creditors and legacies, lord Hardwicke said, at law, where the husband dies indebted, the widow cannot have her *paraphernalia* ; but this court<sup>m</sup> does not determine so strictly ; for, if the personal estate hath been exhausted in payment of specialty creditors<sup>n</sup>, she shall stand in their place, as to so much of the real assets<sup>o</sup> of the heir at law ; for she has a prior right, and a superior one to legatees, who take only by the bounty of the testator<sup>p</sup>. So likewise, if the husband pledges the wife's *paraphernalia*, and dies, leaving a sufficient estate to redeem the pledge, and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate.—But the husband may alienate the same in his lifetime<sup>q</sup> ; that is, he may transfer the property to another. To alienate, or to alien, chiefly relates to lands or tenements, as to alien land in fee, is to sell the fee-simple thereof.

### SECTION THE THIRD.

#### OF MAKING AN INVENTORY.

**T**HE executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action of the deceased ; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required<sup>r</sup>. It is said, that if an executor, without making an inventory, shall interfere in the administration of the goods of the deceased, except in certain cases ; such as the funeral expences, the necessary preservation of the goods, and the like ; he shall be bound to answer to every one of his creditors his whole debt<sup>s</sup> ; and that every legatary may recover

<sup>1</sup> 1 Roll's Abr. 911.

<sup>m</sup> The Court of Chancery.

<sup>n</sup> For what specialty creditors are, see pag. 55.

<sup>o</sup> For what real assets are, see pag. 45.

<sup>p</sup> Case of Snellson and Corbet, June

16, 1746. 3 Atk. 369.

<sup>q</sup> 3 Atk. 394.

<sup>r</sup> Black. Com. 2 V. 510.

<sup>s</sup> Swinb. 228.

his whole legacy at his hands : for in this case the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas otherwise the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made<sup>t</sup>. And therefore if any creditor or legatary affirms, that the testator had any more goods than are comprised in the inventory, he must prove the same : otherwise the judge is to give credit to the inventory, being made in the due form of law<sup>u</sup>. But as the time of exhibiting such inventory is left to the discretion of the ordinary, he may remit the making of it for a reasonable cause ; as, where it may be expedient that the quantity of goods should not be divulged<sup>v</sup>.

By the constitution of Othobon, the inventory shall be made in the presence of some credible persons, who shall competently understand the value of the goods belonging to the deceased ; for it is not sufficient to make an inventory, unless the goods therein contained are particularly valued and appraised by some honest and skilful persons according to their just value in their judgments and consciences ; being estimated according to such price as the same might be sold for at that time<sup>x</sup>. — By the practice of the courts, if the goods of the deceased shall be appraised by any honest persons in the neighbourhood, and reduced into an inventory, and afterwards the inventory shall in due time be exhibited, before the judge who proves the will or grants administration, upon the oath of the executor or administrator ; such inventory shall receive credit in all causes and courts ; and he that exhibits it shall be freed from the burden of

<sup>t</sup> Swinb. 222.

<sup>u</sup> *Ibid.* 426.

<sup>v</sup> Lind. 176.

<sup>x</sup> Swinb. 425.

proving the truth thereof, or that the testator had no more goods; but the legatee, or other persons preferring claims, are to prove that goods have been omitted therein<sup>Y</sup>.

SOMETIMES when there is a contest, it is demanded, and by the judge decreed, at the instance of the party having interest in the goods of the deceased, that an inventory be exhibited upon the oath of the executor or administrator, before the issuing of the probate or letters of administration under seal; and then, notwithstanding the former general oath<sup>Z</sup> had been taken for the faithful administering the goods of the deceased, and for exhibiting a true inventory, a special oath hath been used to be taken, at the time of exhibiting the inventory, of the truth thereof, and that either personally or by virtue of a commission. And sometimes before the granting, or at least before the issuing, of the probate or letters of administration (instead of an inventory of the goods of the deceased upon the oath of the party), at the request of some person having interest, the judge issueth a commission for the appraisement and true valuation of the goods, rights, and credits, and inspection of the obligations, leases, and other writings and papers whatsoever, concerning the personal estate of the deceased, at the house of the deceased, or elsewhere, wheresoever his goods, rights, or credits remain or be, on such a day or days, with continuation and prorogation of the time and place, as shall be needful. Also in these cases, there usually issues a monition against the other party in special, and all others in general, with whom any of the goods, rights, or credits of the deceased remain and be, that they exhibit or shew, or cause to be exhibited or shewn, really and with effect, to the appraisers, by virtue of the com-

<sup>Y</sup> 1 Oughton's *Ordo Judiciorum*, 344.

<sup>Z</sup> Pag. 13.

mission aforesaid appointed, at the time and place of the execution thereof, the aforesaid goods, rights, and credits of the deceased, and also the bonds, leases, and other writings and papers concerning the personal estate of the deceased, remaining or being with them, or any of them; to the end that they may be appraised and put in the inventory, on pain of law and contempt.—Such commission being duly executed, the inventory is brought in and exhibited, signed by the hands of the commissioners or appraisers, or two of them at the least, without the oath of the party for the truth thereof. And also in such cases, an inventory is often required upon the oath of the executor or administrator, of such goods of the deceased as have been already disposed of<sup>a</sup>.

AFTER the inventory is exhibited, a creditor shall not be admitted to object thereto in the ecclesiastical court; for the statute<sup>b</sup> which requires the executors or administrators to make an inventory, only enjoins them to deliver it in upon oath into the keeping of the ordinary; and the ordinary, by the same statute, is required to receive the same so presented or tendered to be delivered.—The court of King's Bench being moved, to grant a prohibition to the ecclesiastical court, on behalf of Mrs. Catchside an administratrix; she having been cited into an inferior ecclesiastical court at the promotion of Ann Ovington, a creditor, to exhibit an inventory, which she accordingly brought in, and the creditor objected to it, and obtained a decree. The administratrix then appealed to the superior ecclesiastical court, which affirmed the decree. The suggestion on which the plea for a prohibition was built was, the want of jurisdiction of those courts. The reply to which, on shewing cause, was, that it being after sentence, it was now too late for a prohibition, unless it should appear that they had determined contrary to law. But lord

<sup>a</sup> 1 Ought. 344. 5.

<sup>b</sup> 21 Hen. VIII. c. 5.



Mansfield and the court were of opinion, that from the face of the proceedings, it appeared that the spiritual court had no jurisdiction, and therefore the rule for a prohibition was made absolute <sup>c</sup>.

THE things that are to be put into the inventory, we may perceive by what has before been said, concerning the particulars the administrator is interested in, by virtue of his administration <sup>d</sup>.—Debts owing to the deceased, of which there is no writing or obligation, it is said, ought not to be put into the inventory before they be received; because before that they are not found to be debts, at least so much as that they may be handled or taken hold of; but afterwards, when such debts are received, they ought to be put into the inventory as goods newly accruing <sup>e</sup>. But unless they be bad debts, it seems best to insert them; and even if they be bad debts, or desperate, yet they may be inserted, specifying them as such. And if in the course of administration they shall be recovered, then they shall be accounted for in like manner as the rest of the personalty: and if they cannot be recovered, or so much of them as cannot be recovered, shall not be accounted for as any part of the goods of the deceased <sup>f</sup>.—Debts, which the deceased owed to others, says Lindwood, ought not to be put in the inventory; because they are not the goods of the deceased, but of other persons. Yet they may be put in, if it shall seem expedient <sup>g</sup>.—If the inventory should never be required, yet the person who applies for an administration, should obtain knowledge of the value of the deceased's goods, chattels, and credits; that he may be prepared to take the oath mentioned in the fourth section of the foregoing chapter.

By the statutes of the 5 W. & M. c. 20. and 9 W. c. 25. it is required, that the inventory be written or ingrossed on paper or parchment, having a double fix-

<sup>c</sup> Case of Catchside and Ovington,  
T. 6 Geo. III. 1 Burr. Rep. 1922.

<sup>d</sup> Pag. 28—37.

<sup>e</sup> Lind. 176.

<sup>f</sup> 4 Burn's Eccles. Law, 241.

<sup>g</sup> Lind. 176.

penny stamp; and by the statute of the 23 Geo. III. c. 28. there is an additional duty of one shilling added thereto; so that now the inventory must be written or ingrossed on paper or parchment, stamped with a two shilling stamp.—It may be made in the following form, with variations, according to the condition of the goods to be inventoried.

*A true and perfect inventory of all the goods, chattels, wares, and merchandizes, as well moveable as not moveable, of A. B. late of C. in the county of \_\_\_\_\_, in the diocese of \_\_\_\_\_, yeoman, deceased, made by us whose names are hereunto subscribed, the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord*

|   |       |       | £.  | s. | d. |
|---|-------|-------|-----|----|----|
| His purse and apparel,                      | _____ | _____ | 15  | 0  | 0  |
| Horses and furniture,                       | _____ | _____ | 20  | 0  | 0  |
| Horned cattle,                              | _____ | _____ | 27  | 0  | 0  |
| Sheep,                                      | _____ | _____ | 20  | 0  | 0  |
| Swine,                                      | _____ | _____ | 0   | 13 | 0  |
| Poultry,                                    | _____ | _____ | 0   | 3  | 4  |
| Plate, and other household goods,           | _____ | _____ | 18  | 0  | 0  |
| One lease of, &c.                           | _____ | _____ | 30  | 0  | 0  |
| Rent in arrear,                             | _____ | _____ | 35  | 0  | 0  |
| Corn growing at the time of his death,      | —     | —     | 12  | 0  | 0  |
| Hay and corn,                               | _____ | _____ | 10  | 0  | 0  |
| Ploughs, and other implements of husbandry, | _____ | _____ | 6   | 10 | 0  |
| Debts,                                      | _____ | _____ | 100 | 0  | 0  |

Total, 294    6    4

Other debts supposed to be desperate, \_\_\_\_\_ 25    2    6

Debts owing by the deceased, 250l.

Appraised by us the day and year above written,

D. E.

F. G.

SECTION THE FOURTH.

OF GETTING IN THE EFFECTS, AND WHAT SHALL  
BE ASSETS IN THE ADMINISTRATOR'S  
HANDS TO MAKE HIM CHARGEABLE.

**F**OR collecting the goods and chattels of the deceased, the executor or administrator has very large powers and interests conferred on him by the law, being the representative of the deceased. And an executor or administrator may, after the death of the deceased, enter into the house where the deceased lived, and where he died, and where the goods are, and take them away, and justify it; but he must do it within convenient and reasonable time, as within thirty days after his death, or thereabouts, and in a quiet and fair manner when the door is open<sup>b</sup>.—In the former part of this chapter we have seen, that administrators are put upon the same footing, with regard to suits, as executors appointed by will, and that they shall have actions to demand and recover, as executors, the debts due to the intestate. An administrator may have an action upon a judgment, statute, recognizance, obligation, or other specialty made to his intestate; or upon any covenant or contract; and he shall have an action of trespass or trover for the goods of the intestate taken in his life; and an action for a trespass with cattle in his close<sup>1</sup>. And towards the beginning of this chapter we have seen, that for the most part the same actions the deceased might have had, the administrator shall have also; and that in actions arising by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by the executors or administrators. Likewise we have seen, that administrators are empowered to distrain for rent in

<sup>b</sup> Shep. Touch. 453.

<sup>1</sup> Com. Dig. Administration (B. 13).

arrears.—Where any judgment after verdict shall be had, by or in the name of any executor or administrator; in such case an administrator of goods not administered, may sue forth a writ of *scire facias*, and take execution upon such judgment<sup>k</sup>.

IN all actions brought by executors or administrators, upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life, they shall pay no costs by any statute<sup>l</sup>. Executors and administrators, when suing in the right of the deceased, shall pay no costs: for the statute 23 Hen. VIII. c. 15. doth not give costs to defendants, unless where the action supposes the contract to be made with, or the wrong to be done to, the plaintiff himself<sup>m</sup>. And when an executor must declare as executor, he shall pay no costs: but if the cause of action arises in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not declare as executor, he shall be liable to pay costs<sup>n</sup>.—On a question, whether an executor should be permitted to discontinue, without payment of costs. For the plaintiff executor, it was urged, that an executor should not pay costs in any instance excepting one, viz. where he had brought an action as executor, which he might have brought in his own name: but the court were of opinion, that the giving an executor leave to discontinue, was matter of discretion in the court; and they ought not to give him such leave, in any case where he hath knowingly brought his action wrong, unless he will consent to pay costs<sup>o</sup>. On a judgment of *non profectur*<sup>p</sup>, for the executor's wilful delay he shall pay costs<sup>q</sup>.

<sup>k</sup> Stat. 17 Car. II c. 8.

<sup>l</sup> New Arr. tit. Costs.

<sup>m</sup> Black. Com. 3 V. 400.

<sup>n</sup> Sir. 682.

<sup>o</sup> Bur. Mansf. 1451.

<sup>p</sup> *Non profectur*, or, as it is usually termed, *non pros*, is where any person commences an action and does not declare, either the term the writ is returnable, or before the end of the ensuing term; the defendant against whom

the action is brought, having appeared, may sign a *non pros* at any time in the vacation of such ensuing term, and not after. Attorney's Pract. E. tit. 16. And the plaintiff for thus deserting his complaint, in not pursuing his action, shall not only pay costs, but is liable to be amerced to the King: Black. Com. 3 V. 296.

<sup>q</sup> Bur. Mansf. 1584.

ASSETS are real, or personal ; where a man has lands in fee-simple, and dies seised thereof, the lands which come to his heir are assets real ; and where he dies possessed of any personal estate, the goods which come to the executors or *administrators* are assets personal. *Assets* are also divided into assets by descent and assets in hand. *Assets* by descent are where a person is bound in an obligation, and dies seised of lands which descend to the heir, and which lands shall be assets, and the heir shall be charged as far as the land to him descended will extend \*. *Assets* in hand are where one dies indebted, and appoints executors, or dies intestate, and the executor or administrator hath sufficient in goods or chattels, or other profits, to pay the debts, or some part thereof ; this shall be said to be assets in his hands, and for so much he shall be charged †. There is also another division of assets, into *legal* and *equitable* assets : *legal assets* are such as are liable by the course of law ; *equitable assets* are such as are only liable by the help of a court of equity ‡. As to real assets and assets by descent, which more immediately concern the heir, more will be said hereafter §. We shall therefore proceed to consider what are assets in the administrator's hands to make him chargeable.

ALL those goods and chattels, actions and commodities, which belonged to the deceased in right of action or possession, as his own, and so continued to the time of his death, and which after his death the executor or administrator gets into his hands, as duly appertaining to him in right of his executorship and administration ; and all such things as come to the executor or administrator in lieu, or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator, to make him chargeable to a creditor or legatee ¶.

ASSETS in the hands of one of the executors shall be said to be assets in the hands of all the executors ; and assets in any part of the world shall be said to be assets in every part of the

\* Terms of the Law.

† Shep. Touch. 472.

‡ See pag. 59.

§ Pag. 93, 94.

¶ Shep. Touch. 472.

world : and therefore if that point be in issue, and it appear that there are assets in the hands of any one of the executors, or in any county or place whatsoever, the jury must find that there are assets <sup>a</sup>. And though a plantation be an inheritance, yet, being in a foreign country, it is a chattel to pay debts, and a thing that is testamentary <sup>y</sup>. All goods and chattels, of what nature or kind soever, that are valuable, as oxen, kine, corn, &c. shall be esteemed assets. But such things as are not valuable, as a presentation to a church, and the like, shall not be accounted assets <sup>z</sup>.

ALL the goods and chattels that come to the executor or administrator, in the right of their executorship or administration, and are by law given to them by virtue thereof, in the right of the deceased (as herein before particularised <sup>a</sup>), and which are in possession, shall be esteemed assets in his hands ; and goods pledged to the deceased, and not redeemed, or the money wherewith they are redeemed, shall be said to be assets in the hands of the executor or administrator <sup>b</sup>. And all the goods and chattels in action or possibility at the time of the death of the deceased, that are afterwards recovered, and of which the executor or administrator hath obtained possession ; when they are so recovered, are esteemed assets in his hands. But they are never accounted assets, until they are recovered and in possession ; therefore if there be debts owing to the deceased upon statutes or obligations, or otherwise, these are never esteemed assets in the hands of the executor or administrator, until they are recovered. So likewise, though there be debt or damage, recovered by a judgment had by the deceased, until execution be made this shall not be esteemed assets in the hands of the executor or administrator. So if the executor bring an action of trespass against another *de bonis asportatis in vita testatoris*, for goods carried away in the life of the testator, and he have a judgment

<sup>a</sup> Shep. Touch. 472.

<sup>y</sup> 2 Vent. 358.

<sup>z</sup> Shep. Touch. 472.

<sup>a</sup> Pag. 28—37.

<sup>b</sup> Shep. Touch. 472.

for damages; in this case, until he hath recovered by execution, it shall not be esteemed assets in his hands. And if the judgment be erroneous, and the execution avoidable; in this case, although it be recovered and gotten in possession, yet it shall not be esteemed assets. And therefore, if one sue another, and recover against him as administrator of J. S. and after a testament made by J. S. is produced and proved, and thereby an executor is made; in this case the money recovered by the administrator shall not be said to be assets in his hands as to any of the creditors; because the executor may recover it from him, or the debtor will have it again. And if the executor or administrator never recover, or get the thing into his possession, he shall never be charged, especially where he has done his best to get it, and cannot.

If one covenant to make a lease for years to the deceased, his executors or administrators, and after his death the lease is made to the executor or administrator accordingly; in this case, this lease shall be said to be assets in his hands, and he shall be chargeable for so much to any creditor <sup>c</sup>. And if an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors <sup>d</sup>. And whatsoever the executor or administrator must be forced to sue for by the name of executor or administrator, being recovered, shall be esteemed assets in his hands <sup>e</sup>. And if an executor recovers (as executor) things in chancery by equity, these things recovered shall be assets <sup>f</sup>.

ALTHOUGH the thing be extinct, and gone as to the executor and administrator himself, yet it may have its being, and be accounted assets as to creditors and legatees. And therefore, if an executor or administrator have a lease for years of land, in the right of the deceased, and afterwards he purchases the fee-simple of the land (whereby the lease is drowned), yet in this case the lease shall continue to be assets as to creditors and legatees <sup>g</sup>. And if an executor surrenders a term of years which he had as executor to him in reversion, it is not extinct as to him, but shall still remain assets in the executor to satisfy debts and legacies <sup>h</sup>. And if the debtee make the debtor his executor, or the debtee die intestate, and the administration is committed to the debtor;

<sup>c</sup> Shep. Touch. 473.

<sup>d</sup> 2 Cha. Ca. 208.

<sup>e</sup> Shep. Touch. 473.

<sup>f</sup> 1 Roll's Abr. 920.

<sup>g</sup> Shep. Touch. 473.

<sup>h</sup> 1 Co. Rep. 87.

in these cases the debt shall be said to continue, and shall be esteemed assets for so much as to other creditors <sup>l</sup>. Yet, if there be sufficient assets to pay the testator's debts, the debtor being made executor, is thereby discharged of the debt <sup>k</sup>.

THE goods and chattels of other men in the hands of the executor or administrator, that were in the possession of the deceased, if he had no right to them, or if he had, and they do not belong to the executor, will not make the executor or administrator chargeable; for these shall not be esteemed assets in his hands. And therefore, if the goods of another man be amongst the goods of the deceased, and these come together into the hands of the executor or administrator; these goods that are the goods of another shall not be said to be assets in the hands of the executor or administrator. And if the executor receive a rent that belongs to the heir, this rent shall not be said to be assets in his hands; and hence it is, that if the deceased were outlawed at the time of his death, his goods and chattels are not to be accounted assets, for they are none of his <sup>l</sup>.

A RELEASE of a certain debt due to the testator makes it assets in the executor's hands; because it shall be intended he would not have made the release unless the money had been paid to him <sup>m</sup>. And if an executor puts in suit a bond of 100l. for performance of covenants, and the parties submit to an award, and it is awarded that the obligor shall pay 70l. in full satisfaction, and that the executor shall release, which is done accordingly; it seems, that the executor shall be taken to have assets to the value of the whole 100l. for though by the award he was compelled to release, it was his own act to submit to the arbitrament <sup>n</sup>.

IF a man hath a lease for years worth 20l. *per annum* at the rent of 5l. and he die; in this case not the whole value of the land, but so much as is above the rent, shall be said to be assets in the hands of the executor or administrator <sup>o</sup>. As where an executor has a lease for years of the value of

<sup>l</sup> Shep. Touch. 474.

<sup>k</sup> Black. Com. 2 V. 512.

<sup>l</sup> Shep. Touch. 474.

<sup>m</sup> 1 Nelf. Abr. 262.

<sup>n</sup> 3 Leon. 53.

<sup>o</sup> Shep. Touch. 474.



20l. a year, rendering rent of 10l. a year ; it is affets in his hands only for 10l. over and above the rent<sup>p</sup>.—By the statute of the 14 Geo. II. c. 20. before mentioned<sup>q</sup>, it is enacted, that estates *pur auter vie*, in case there be no special occupant<sup>r</sup> thereof, of which no devise shall have been made according to the statute of the 29 Car. II. c. 3. or so much thereof as shall not have been so devised, shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. And by this statute of Car. II. an estate *pur auter vie* shall be affets in the hands of the heir, if he has it as special occupant.

If there is a mortgage for years (whatever be the number), this is affets at law ; because the whole interest is not gone from the mortgagor, the reversion in fee being left in him : but if it is a mortgage in fee, it is only affets in equity, because the legal estate is gone out of the mortgagor<sup>s</sup>. If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir pays him the mortgage money ; and then he may have the benefit of the mortgage<sup>t</sup>. When upon a mortgage, money is made payable to the heir or executor, in that case, before or at the day of payment, the mortgagor hath election to pay it to either ; but after the day of payment is past, and the mortgage forfeited by law, though equity doth give the mortgagor relief, so as upon the payment of the money, he shall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor ; but then he shall be forced to pay it to the executor ; because it came out of the personal estate of the testator, and thither it shall return. But if in the mortgage neither heir nor executor is mentioned, then, after the death of the mortgagee, the law determines it to be paid to the executor<sup>u</sup>.

THE interest which a master hath in a servant is not affets in the hands of an executor ; for a servant whose master is dead, is legally discharged, and is not servant either to the heir or executor<sup>v</sup>. But the interest which one hath in an appren-

<sup>p</sup> Cro. Eliz. 712.

<sup>q</sup> Pag. 30.

<sup>r</sup> A special occupant is, where an estate for life is made to a man and his heirs ; in such case the heir shall have the estate, after the decease of his ancestor, as special occupant, or as a person particularly described, to whom the

estate shall go after the lessee's death.

<sup>s</sup> Burn's Ecclef. Law, 60.

<sup>t</sup> Ibid. 276.

<sup>u</sup> 2 Vern. 67.

<sup>v</sup> 2 Freem. 20. Co. Litt. 208. b Note 1. 13 edit.

<sup>w</sup> Went. 53.

tice, is a chattel personal, and shall go to the executors<sup>z</sup>, of which we shall see more hereafter<sup>v</sup>. Also the interest in the liberty of a prisoner in execution for debt, is a chattel personal, and shall go to the executors<sup>z</sup>.

HAVING seen, in the former part of this section, that the administrator has very large powers conferred on him by the law, here we may observe, that all acts done by him, as long as the administration continues in force, are good, and even though it be afterwards revoked or repealed. But there is a difference taken (6 Co. 18.) when an administration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void: if it is repealed upon a citation, all the acts of the administrator, till the repeal, are good; for by the citation the grant of the administration is not suspended; therefore, if the administration be repealed, all acts done by an administrator, which a rightful administrator might have done, shall be allowed; for in them he acted in the place of a rightful administrator<sup>a</sup>. But if there is any fraud, a creditor may have relief upon the statute of the 13 Eliz. c. 5.<sup>b</sup> — As it hath often been the case to the defrauding of creditors, that such persons who were to have the administration of the goods of others dying intestate committed unto them, if they required it, would not accept the same, but suffered or procured the administration to be granted to some stranger of mean estate, and not of kin to the intestate; from whom themselves, or others by their means, took deeds of gift, and authorities by letters of attorney, whereby they obtained the estate of the intestate into their hands, and yet stood not subject to any debts by him owing; it is enacted by the statute of the 43 Eliz. c. 8. That every person who shall obtain any goods or debts of any person dying intestate, upon any fraud as is above mentioned, or without such valuable considerations as shall amount to the value of the same goods or debts, or thereabouts (except it be in satisfaction of some just and principal debt of the value of the same goods or debts to him

<sup>z</sup> Went. 55.

<sup>v</sup> Pag. 5<sup>2</sup>.

<sup>z</sup> Law of Test. 341.

<sup>a</sup> Comyns, 150.

<sup>b</sup> 6 Co. Rep. 19.

owing by the intestate), shall be charged as executor of his own wrong, so far as such goods and debts will satisfy.

If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased, and many other transactions), he is called in law executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong. Such an one cannot bring an action himself in right of the deceased, but actions may be brought against him. He is chargeable with the debts of the deceased so far as assets come to his hands; and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt.<sup>c</sup> —As the executor of his own wrong is liable to the suit of the rightful executor, creditors, or legatees; so also, in case of his death, are his executors or administrators liable, by the statute of the 30 Car. II. c. 7. although in other cases a personal wrong dies with him that did it.<sup>d</sup>

#### SECTION THE FIFTH.

### THE ADMINISTRATOR'S OFFICE AND DUTY IN PAYING DEBTS.

**I**N payment of debts the executor or administrator must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of lower degree first, he must answer those of a higher out of his own estate.<sup>e</sup> And as to debts of equal degree, he may, as we have before seen, retain what is due to himself.<sup>f</sup>

**FIRST**, The executor or administrator may pay all funeral charges, and the expence of taking the letters of administration.<sup>g</sup> But as to funeral charges it is said, that in strictness,

<sup>c</sup> Black. Com. 2 V. 507.

<sup>d</sup> 4 Burn's Eccles. Law, 191.

<sup>e</sup> Black. Com. 2 V. 511.

<sup>f</sup> Pag. 27.

<sup>g</sup> Black. Com. 2 V. 511.

no funeral expences are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers fees; and not for pall or ornaments<sup>b</sup>. And in general it is said, that no more than forty shillings for funeral expences shall be allowed against creditors<sup>l</sup>.

SECONDLY, Debts due to the King on record or specialty, are to be paid<sup>k</sup>. But this must be understood of such debts as are due to the King only by matter of record or specialty, and not of sums of money due to the King upon wood sales, or sales of his minerals, for which no obligation is given; or for amercements in his courts baron or courts of his honours, which be not courts of record; or for fines of copyhold estates there; or of forfeitures to the crown of debts by contract due to any subject by outlawry or attainder, until office thereupon found<sup>l</sup>.

THIRDLY, Such debts are to be paid, as are by particular statutes to be preferred to all others; as by statute 30 Car. II. c. 3. are the forfeitures for not burying in woollen; and by statute 17 Geo. II. c. 38. is the money due from overseers on poors rates; and by statute 9 Ann. c. 10. the money due for letters at the post-office<sup>m</sup>. As to the forfeitures for not burying in woollen, these by the statute 30 Car. II. c. 3. sect. 4. shall be paid out of the estate of the person deceased, before any statute, judgment, debt, legacy, or other duty whatsoever. And as to money due from overseers, by the statute of 17 Geo. II. c. 38. sect. 3. if any overseer of the poor shall die, his executors or administrators shall, within forty days after his decease, pay out of the assets all money remaining due, which he received by virtue of his office, before any of his other debts are paid. And as to money due for letters to the post-office, by the statute 9 Ann. c. 10. sect. 30. this shall be preferable in payment before any debt due to any private person.

FOURTHLY, Debts of record are to be paid, as judgments (docketed according to the statutes 4 & 5 W. & M. c. 20.), statutes, and recognizances.—A debt of record is a sum of money which appears to be due by the evidence of a court of record; as, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law. This is a contract of the highest nature, being established by the sentence of a court of judicature.

<sup>l</sup> 1 Salk. 196.

<sup>k</sup> 3 Atk. 249.

<sup>b</sup> Black. Com. 2 V. 511.

<sup>l</sup> 2 New Abr. 432. Com. Dig. Administration (C).

<sup>m</sup> Black. Com. 2 V. 511.

Récongnizances also are a sum of money recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like: and these, together with the statutes merchant and staple, &c. if forfeited by non-performance of the condition, are also ranked among the last principal class of debts, *viz.* debts of record; since the contract on which they are founded is witnessed by the highest kind of evidence, *viz.* by matter of record<sup>n</sup>.—As to judgments, they are not only those had against the deceased in his lifetime, but also debts upon judgments (although by mere confession, and without defence), had against the executors or administrators for the debts of the deceased<sup>o</sup>. And of two judgments, he who first sues execution must be preferred; but before, it is at the election of the executor or administrator to pay which he pleases first<sup>p</sup>. It is not necessary, that the judgment be limited to the courts at Westminster; but if it be obtained in any court of record, which hath power to hold plea by charter or prescription of debt above 40s. it is sufficient. For though upon such a judgment execution cannot there be had, but of such goods as are within the jurisdiction of that court; yet, if the record be removed into chancery by a *certiorari* and there by *mittimus* into one of the benches, then execution may be had upon any goods in any county of England<sup>q</sup>. But a judgment not docketted, according to the statutes 4 & 5 W. & M. c. 20. shall not affect any lands as to purchasers or mortgagees; or have any preference against heirs, executors, or administrators, in the administration of the estates of their ancestors, testators or intestates. Which statutes, in order to render more easy the finding of such judgment entered, direct in what manner alphabetical lists shall be made of judgments by confession, *non sum informatus*, or *nihil dicit*, in any of the courts of record at Westminster; to the respective offices of which any person may resort and search, on paying 4d. for every term's search.

<sup>n</sup> Black. Com. 2 V. 465. 511.

<sup>o</sup> Law of Exec. 39.

<sup>p</sup> Treat. of Eq. 112.

<sup>q</sup> Swiab. 456.

IT was decreed in the exchequer, that creditors by judgment at law, and creditors by decree in equity, shall be paid equally without any preference<sup>r</sup>. And it is now become the established doctrine, that a decree of the court of chancery is equal to a judgment in a court of law; and where an executrix, whose testator was greatly indebted to divers persons, in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands (some of the plaintiffs being her own daughters); other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a just debt, and having real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. This being first decreed by the master of the rolls, was affirmed by lord Talbot, and his lordship's decree was affirmed in parliament<sup>s</sup>. — As to statutes, and recognizances, before mentioned, these standing in equal degree, it is at the administrator's election, to give precedency to which he pleases<sup>t</sup>. But those which are forfeited shall be preferred before those which are for the performance of covenants not broken<sup>u</sup>. And neither between one statute and another, doth the time of antiquity give any advantage as touching the goods of the consutor, but he who first seizes them by execution is preferred; and before suing of execution, the executor may give precedency to either<sup>v</sup>.

MORTGAGES may also be reckoned among this last mentioned class of debts; for where a man mortgages land, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage<sup>x</sup>. And though there be no covenant in the deed for the payment of the mortgage money, yet the personal estate shall be liable in the hands of the executor<sup>y</sup>. A mortgage is a charge upon the personal estate, as well as upon the lands mortgaged; and the personal estate is primarily liable: for a mortgage is a general debt, and the land is only

<sup>r</sup> Bunb. 48.

<sup>s</sup> In May 1737. 3 P. Will. 402.

Caf. Talb. 217.

<sup>t</sup> 3 New Abr. 434.

<sup>u</sup> Swinb. 457.

<sup>w</sup> *Ibid.*

<sup>x</sup> 2 Salk. 449.

<sup>y</sup> *Ibid.* 1 Vern. 436.

as security<sup>2</sup>. It was decreed at the rolls, that mortgages were to be paid before judgments and recognizances: but upon an appeal to the house of lords, it was adjudged, that mortgages are not to be preferred to other real incumbrances; but that mortgages, statutes, and recognizances, shall take place according to their priority, and as they stand in order of time<sup>3</sup>.

FIFTHLY, Debts by specialty or special contract are to be paid. When a sum of money becomes, or is acknowledged to be due, by deed or special instrument under seal; such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation; it is considered as a debt by specialty; and such debts are looked upon as the next class after those of record, being confirmed by special evidence under seal<sup>b</sup>. And rent arrear, and unpaid by the intestate, is equal to a debt by specialty; for this favouring of the realty, the administrator can no more wage his law<sup>c</sup> against such a debt, than he can to a debt by specialty<sup>d</sup>. Where an action of debt was brought against an executor, for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets above 5*l*. which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, though reserved on a parol lease, was yet equal to an obligation, and that it still remained in the realty, though the term was determined<sup>e</sup>.

¶ 1 Atk. 487. Whereby the personal estate may be exempted from paying the mortgage money, see p. 202.

<sup>a</sup> Case of the Earl of Bristol and Hungerford. T. 1705. 2 Vern. 524.

<sup>b</sup> Black. Com. 2 V. 465, 511.

<sup>c</sup> *To wage law* is, where the defendant swears, that he does not owe the plaintiff any thing. This was more common formerly than it is now. It is now only in actions of debt upon simple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods restored, and the account balanced without any evidence of either, that the defendant is admitted to wage his law; and not where there is any specialty by bond or deed. And as the defendant

is only allowed to wage his law in an action of debt; at present, one shall hardly hear of an action of debt brought upon a simple contract, that being supplied by an action of trespass on the case, for the breach of a promise or assumpsit; and this being an action of trespass, no law can be waged therein. So that wager of law is now quite out of use, being avoided by the mode of bringing the action, but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, in which no wager of law shall be allowed. Black. Com. 3 V. 341.

<sup>d</sup> 2 New Abr. 414.

<sup>e</sup> *Ibid*.

As to a bond, any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt: but if the bond be merely voluntarily, a real debt (though by simple contract only) shall have the preference. But if there be no debt at all, then a bond, however voluntary, must be paid by an executor<sup>f</sup>. And although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator. And the law is the same of administrators. But the heir shall not at any time be charged without express mention of the heir<sup>g</sup>.

BEFORE we proceed to consider the last species of debts, *viz.* debts by simple contract, we may here make some observations on what has been said concerning debts of record, and debts by specialty, and special contract. As to debts of record, we may observe, that the executor ought to take notice of these at his peril<sup>h</sup>. But as to debts due by bond, or other specialties, although the law requires that debts shall be paid according to their superiority, as herein set forth; yet, an executor may pay a debt on a simple contract before a specialty, if he hath no notice of such specialty; for otherwise it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket, until the executor shall have paid away all the assets, in discharging simple contract debts<sup>i</sup>. Respecting obligations, if there be divers of the like kind, it seemeth to be in the power of the executor to discharge which obligation, and to gratify which of the creditors, he thinks fit (in like manner as was before said respecting debts of record<sup>k</sup>): which being done, the other creditors are without remedy, if there be no assets; unless the day of payment in the one obligation is expired, and the day of payment in the other obligation is not yet come; in which case, the former obligation is to be first satisfied; or unless there be suit commenced for some obligation, for then it is not in the power of the executor to discharge another obligation for which no action is brought, in prejudice of the former suit. But an executor may confess judgment on one obligation, and

<sup>f</sup> 3 P. Will. 222. Comyns, 255.

<sup>g</sup> Dyer, 23.

<sup>h</sup> 2 New Abr. 435.

<sup>i</sup> 2 New Abr. 435.

<sup>k</sup> Pag. 54.



plead that judgment to an action brought on another obligation. And if there be two obligations, and the two several creditors bring several actions against the executor, he that first obtains judgment must be first satisfied<sup>1</sup>.

DEBTS upon judgments, recognizances, mortgages, bonds, and other like specialties, shall carry interest: so interest hath also been allowed upon demands due by covenant, although it was objected that they were not liquidated, and only found in damages<sup>2</sup>.—Interest of an annuity being decreed by the lord chancellor from the very day it became due, Mr. Peere Williams adds a query as to this, and says, it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due; if payable half-yearly, then from the next half-year day; if quarterly, then from the next quarter-day; and so has been the common rule in these cases<sup>3</sup>.—Where a man prays satisfaction for a simple contract debt, merely out of personal assets, a court of equity will of course direct the debt to be paid with interest, to be computed from one year after the testator's death<sup>4</sup>.

DEBTS by simple contract, which are the last species of debts to be paid, are such where the contract upon the obligation arises, is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes unsealed, which are capable of more easy proof, and therefore are only better than a verbal promise; and this last species of debts may be branched out into a variety of obligations through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law<sup>5</sup>. Debts by simple contract, though postponed to all others, an executor, or administrator, is bound to pay as far as he hath assets<sup>6</sup>. Yet if no suit is commenced against him, he may pay one creditor in equal degree his whole debt, though he has nothing left for the rest: for without a suit commenced, the executor has no legal notice of the debt<sup>7</sup>. And no action shall be brought whereby to charge an executor or administrator, upon any special promise, to answer damages out of his own estate; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing,

<sup>1</sup> 4 New Abr. 434. Swinb. 457, 458.

<sup>2</sup> 14 Vin. Abr. tit. Interest.

<sup>3</sup> 1 P. Will. 541.

<sup>4</sup> Barnard, 229. See more of interest

on debts in a subsequent chap. p. 209.

<sup>5</sup> Black. Com. 2. V. 466. § 11.

<sup>6</sup> 2 New Abr. 434.

<sup>7</sup> Black. Com. 2. V. § 12.

and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized\*.

As to the interest a man hath in an apprentice, which we lately mentioned to be a personal chattel that goes to the executor. It was held by Holt, chief justice, that by the custom of London, the executor of the master should put the apprentice to another master of the same trade; and that in other places it would be very hard to construe the death of the master to be a discharge of the covenants; though he admitted that the covenant for instruction had been considered as cancelled, but that he still continued an apprentice with the executor as to maintenance. And where a master received with an apprentice 250*l.* and died within two years, the apprentice during that time having been employed only in inferior affairs: it was decreed, after debts on specialties were paid, that the executors should repay 250*l.* as a debt due on simple contract, deducting after the rate of 20*l.* a year for the maintenance of the apprentice, during the time he lived with his master.†—In an action of debt on bond, conditioned for Matthias Anderson's performance of the covenants in an indenture of apprenticeship, whereby he was bound to the plaintiff's testator, who was a mariner: the defendant pleaded that Anderson served faithfully to the death of the testator: the plaintiff replied, that since the death of the testator, Anderson had absented from her service: to which there was a demurrer. And after argument at bar, the chief justice delivered the resolution of the court, viz. That they were all of opinion, the defendant should have judgment; and the executrix could maintain no such action. The binding was to the man, to learn his art, and serve him, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master.‡—In a late case wherein it being contended, that the contract between a master and his apprentice is merely personal and dies with the master; it was said by lord Mansfield, that though an apprentice is not strictly assignable, nor transmissible, yet, if he continue, with the consent of all parties and his own, it is a continuation of the apprenticeship\*.

\* Stat. 29 Car. II. c. 3. sect. 4.

† Page 50.

‡ 1 Salk. 66.

¶ Case of *Spam against Bowden* and Eyles, in the court of Chancery, M. 39 Geb. II. Ch. Ca. Finch, 396.

¶ Case of *Baxter against Burfield*, T. 12 Geo. II. Str. 1115.

\* The King *against* the inhabitants of Stockland, King's-Bench, H. 19 Geo. III. Doug. Rep. 70. 2 Edit.

IN respect to legal and equitable assets; if a man possessed of a term for years, mortgages it, and dies, leaving debts, some by bond, and some by simple contract, the equity of redemption is equitable assets, and shall be liable to all the debts equally<sup>1</sup>. — A lease for years, or a bond, or grant of an annuity taken in a trustee's name, being personal assets, shall be applied in course of administration<sup>2</sup>; that is, as has been shewn. The distinction seems to be this: where there are legal assets, that is, assets which are liable at law without the help of equity, there the executor may apply them, according to the course of law, which allows and requires a preference to be made as hath been mentioned; but where there are only equitable assets, that is, assets which are not liable, without the help of a court of equity, in such case, the court will direct the application thereof, according to that course which seems most equitable and just, that is, to pay every creditor his share in proportion<sup>3</sup>. So where the assets are partly legal, and partly equitable, although equity cannot take away the legal preference on legal assets; yet where one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him till there is an equality, in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets<sup>4</sup>.

BUT now to return to the subject of paying debts with legal assets in such manner as the law requires. If one that hath a debt due to him from the deceased upon a simple contract or the like, sue the executor or administrator for it, and there be debts due to others upon bonds and specialties, unsatisfied; in this case, the executor or administrator may not

<sup>1</sup> 3 P. Will. 341.

<sup>2</sup> 2 Vern. 764. 3 P. Will. 342.

<sup>3</sup> 4 Burn's Eccles. Law, 297. To determine the difference between legal and equitable assets where land hath been devised for payment of debts, a distinction has been made where the same persons that were trustees to sell the land were executors, and where they were not. The generality of the old cases determine that money arising by sale of land devised to, or subject to the power of executors, to sell for payment of debts and legacies, should be legal assets in their hands (although they could

not be charged with the value of the lands before sale). Yet some of the old cases, considering the devisee in the double character of trustee and executor, preferred the former, and consequently made the assets equitable; and the modern cases incline strongly to this construction; yet it seems that where an estate descends to the heir charged with the payment of debts, it will be legal assets. 2 P. Will. 416. Note 2. 4 edit.

<sup>4</sup> 4 Burn's Eccles. Law, 297.

pay this debt, nor may he suffer the plaintiff to recover in his action; for if he doth, and he hath not assets besides to satisfy the debts due upon bonds and specialties, he must satisfy so much out of his own estate, as he hath so paid, or suffered to be recovered from him; for in the case of an action brought, he is to plead and to set forth these debts upon specialties, and to say that he hath no more than what is sufficient to satisfy them; and thereby he shall bar the plaintiff in his action. In like manner it is, if one that hath a debt due to him from the deceased upon an obligation, sue the executor or administrator thereupon, and there be debts due to others upon judgments, statutes, or recognizances, and the executor or administrator suffer the plaintiff to recover the debt due upon the obligation, for want of pleading the judgments, &c. in this case he must pay so much out of his own estate, towards the satisfaction of the said debts due upon judgments, &c. as he hath paid of the debt due upon the obligation. But here it must be observed, that no judgment or statute that is discharged, or is left and suffered to lie by agreement to bar others of their debts, shall be any bar to others that sue for their due debts upon obligations, &c.; and therefore if any executor or administrator shall plead such judgments, &c. in bar of any other debt sued for by any other creditor, the creditor may, by special pleading, set forth this matter of covin, and avoid the plea and bar of the executor or administrator<sup>c</sup>.

In an action of debt against an executor, if the defendant plead fully administered, and any assets be found in his hands, although there be not to the value of the debt; yet the plaintiff shall have judgment for his whole debt of the goods of the testator<sup>d</sup>. But if it be found, that he had nothing in his hands; the judgment shall be, that the plaintiff shall take nothing by the writ, and shall not have judgment of the debt: for he hath waved this advantage by taking of the issue, and judgment is to be given upon the verdict<sup>e</sup>.—Where a testator is much indebted, and the executor is desirous to be rid of the assets, his safest way is, to file a bill in chancery against the creditors, to the end they may, if they think fit, contest each other's debts, and dispute who ought to be preferred in payment<sup>f</sup>.

<sup>c</sup> Shep. Touch. 457.

<sup>d</sup> 1 Roll's Abr. 929.

<sup>e</sup> *Ibid.*

<sup>f</sup> 2 Vern. 37.

SECTION THE SIXTH.

OF ACCOUNTING BEFORE THE ORDINARY.

**B**Y the statute of the 22 & 23 Car. II. c. 10. the ordinaries shall and may proceed and call administrators to account, for and touching the goods of any person dying intestate, and upon hearing and due consideration thereof, order and make just and equal distribution of what remains clear (after all debts, funerals, and just expences, of every sort, are allowed and deducted); and the same distributions decree and settle, and compel such administrators to observe and pay the same, by the due course of his majesty's ecclesiastical laws: saving to every one, supposing himself or themselves aggrieved, their right of appeal, as has been always in such cases used. But by the statute of the 1 Jac. II. c. 17. sect. 6. it is provided, as was before mentioned <sup>a</sup>, that no administrator shall be cited according to the said act of the 22 & 23 Car. II. c. 10. to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof), unless it be at the instance or prosecution of some person in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin, nor be compellable to account before any the ordinaries or judges, by the said act impowered and appointed to take the same, otherwise than as is aforesaid; any thing in the said act to the contrary notwithstanding. — The account must be passed before the same judge, or his surrogate or successor, that grants the administration.

If any person having interest shall call the administrator to exhibit a true, full, and perfect inventory of the goods of the deceased which have come to his hands, and to give an account of his administration thereof; he who is called in such case, is bound personally to exhibit such inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof <sup>b</sup>. And as proofs made upon the account, at the instance of some one or more persons having

<sup>a</sup> Page 15.

<sup>b</sup> Oughton's Ordo Jud. 345.

interest,

interest, do not bind others who are not parties to the suit; therefore, to prevent multiplicity of actions, it behoves the administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in special, and all others in general, having or pretending to have interest in the goods of the deceased to be present, if they think fit, at the rendering and passing the account. And then upon their appearance, or contempt in not appearing, the judge will proceed to give sentence; and the account thus determined will be final<sup>1</sup>.

AN executor or administrator shall be allowed all reasonable expences, as well in law-suits, as for other honest purposes: And this reasonableness of expences to be such, as that he may receive thereby neither profit nor loss<sup>2</sup>. And therefore he shall be allowed his expences in secular courts, over and above such costs as were allowed there<sup>1</sup>.

IN an action of debt upon a bond entered into by an administrator to the ordinary, upon taking letters of administration, the question was, whether an administrator, by virtue of this obligation, was bound to go, and give in his account in the spiritual court without being cited? And by Holt, chief justice, who delivered the opinion of the court, 1. It appears by the statute of Edward III. that an executor was compellable to account before the ordinary, and so was an administrator: but that the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor swear to the truth of them. So it was if a creditor sued in the ecclesiastical court; for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant before the statute was compellable to prove the whole account; for the legatee had no other remedy, and the ecclesiastical court, which had a jurisdiction of legacies, could not otherwise do right: yet in such a case, if the executor would pay him, he could not sue farther, for he had right done him, and the executor was not liable, but of necessity that right might be

<sup>1</sup> Oughton, 354.

<sup>2</sup> Lind. 178.

<sup>1</sup> Floyer's Proctor's Praet. 37.

done. 2. A person entitled to distribution on the 22 Car. II. is in consequence entitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and as a statute legatee, shall have the same remedy as the other legatee might before the statute. The condition of an administration bond was, to account when required: therefore he was not to account before he was legally cited, which could not be *ex officio*<sup>m</sup>; and therefore the statute of Jac. II. whereby the ordinary is prohibited from citing him in *ex officio*, had really no effect at all, for the law was so before: but since the statute of Car. II. the condition of administration bonds being, that he account at a day certain, he must account accordingly at his peril, and that without citation or suit; and this account must be in court; and if he comes at the day, and no court is held, he shall be excused: for he may plead he was there ready, and no court held. But then this account is not examinable, unless a party interested comes in and controverts it<sup>n</sup>.

It is said the ordinary hath but a lame jurisdiction, and there being no negative words in the statute of Car. II. a bill for distribution properly lies in chancery<sup>o</sup>. And where the surplus of the personal estate for want of distribution by a will is distributable, there can be no suit for it in the spiritual court<sup>p</sup>.—Where a man died intestate, and his widow took out letters of administration to him; the intestate's brother cited the widow into the spiritual court, to make distribution of her deceased husband's estate. The widow there suggests, that the brother had goods of the intestate in his hands to the value of 200l. And upon this the spiritual court orders him to bring the 200l. into court, to the end it may be distributed. And for not bringing it in, they excommunicate him. Upon which he moves in the King's Bench for a prohibition; and it was granted as to the whole process that compelled him to bring in the 200l. For by the court, the spiritual court hath power to make distribution of the estate, when it comes in, but not to fetch it in; because that is to hold plea of debt; but the spiritual court might refuse, in this case, to proceed to distribution, until the brother had brought in the 200l. but they cannot excommunicate him for not bringing it in<sup>q</sup>.

<sup>m</sup> Explained, pag. 12.

<sup>n</sup> 2 Salk. 315.

<sup>o</sup> 2 Vern. 362.

<sup>p</sup> 5 Mod. 247. Str. 365.

<sup>q</sup> Case of Clerke and Clerke, T. 10. W. L. Raym. 585.

## C H A P. III.

*Of Distribution.*

## SECTION THE FIRST.

WHAT THE ADMINISTRATOR IS TO OBSERVE  
BEFORE HE MAKES DISTRIBUTION.

**B**Y the statute of 22 & 23 Car. II. c. 10. whereby we have seen that ordinaries may call administrators to account, and order and compel them to make distribution<sup>r</sup>; it is enacted, to the end that a due regard be had to creditors, that no such distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death; and that such, and every one, to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the ecclesiastical courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, that then, and in every such case, he or she shall respectively refund and pay back to the administrator, his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator, by reason of such debt, out of the part and share so as aforesaid allotted to him or her.

By the statute of the 20 Geo. III. c. 28. it is enacted, that after the first of June 1780, there shall be charged on every skin or piece of vellum or parchment, or sheet or piece of paper, upon which shall be engrossed, written, or printed, any receipt or other discharge, for any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of the statute of distribution, or the custom of any province or place, the amount whereof shall not exceed the value of 20l. a stamp duty of 2s. 6d. And where the amount thereof shall be of the value of 20l.



and not amounting to 100l. a stamp duty of 5s. And where the amount shall be of the value of 100l. and upwards, a stamp duty of 20s. And that such receipt or other discharge shall be stamped before ingrossed, written, or printed; and if the same is not stamped as by this act is directed, or shall be stamped for a lower duty than as aforesaid, no such receipt shall be pleaded, or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity. And by the statute of the 23 Geo. III. c. 58. it is enacted, that from the first of August 1783, the following additional duty shall be added to the above, *viz.* on every skin or piece of vellum or parchment, or sheet or piece of paper, on which shall be ingrossed, written, or printed, any receipt or other discharge, for any legacy left by will or other testamentary instrument, or for any share of a personal estate divided by force of the statute of distributions, or the custom of any province or place, the amount whereof shall not exceed the value of 20l. there shall be charged an additional stamp duty of 2s. 6d. And where the amount thereof shall exceed the value of 20l. and not amount to 100l. an additional stamp duty of 5s. And where the amount thereof shall be of the value of 100l. an additional stamp duty of 20s. and a like additional stamp duty upon every further sum of 100l. So by this latter act, the receipt or discharge, that by the former was to be on paper or parchment stamped with a 2s. 6d. stamp, must now be on paper or parchment stamped with a 5s. stamp. And where it was to be a 5s. stamp, it must now be a 10s. stamp. And where it was to be a 20s. stamp, it must now be a 40s. stamp. And if the legacy or personal estate amount to 200l. the receipt or discharge for the same must be on parchment or paper stamped with a 60s. stamp, and so for as many hundred pounds as there are more than 100l. there must be so many 20s. added to the first forty; as for example, suppose the legacy or personal estate, for which there is to be a receipt or discharge, should amount to 100l. then the paper or parchment on which it is to be written, printed, or ingrossed, must have thereon a 40s. stamp; if it amount to 200l. a 60s. stamp; if it amount to 300l. an 80s. stamp; and so for as many hundred pounds as it amounts to more than 300l. so many more 20s. must be added to the 80s.

BUT in this latter act is contained a proviso, that nothing therein contained shall extend to charge with the additional duties, by this act imposed, any legacy left by will or other testamentary instrument, or any share, or part of a personal estate, to be divided by force of the statute of distributions, or the custom of any province or place, which shall be left to the *wife, children, or grandchildren*, of the person making such will, or shall be divided amongst them by force of the said statute or custom. So here it may be observed that, the wife, children, and grandchildren, are exempt from the duties to which others are liable by this act, but not from those of the former act; therefore for any legacy or personal estate, the amount whereof shall not exceed the value of 20l. their receipt, or discharge, must be on paper or parchment, stamped with a 2s. 6d. stamp. And where the amount shall be of the value of 20l. and not to the amount of 100l. such receipt or discharge must be on paper or parchment, stamped with a 5s. stamp. And where the amount shall be of the value of 100l. *and upwards*; on paper or parchment, stamped with a 20s. stamp. By the words *and upwards*, we may observe the wife, children, and grandchildren, are not liable to more than a stamp duty of 20s. if what they receive should amount to more hundreds of pounds than the first 100l. for, till this latter act took place, 20s. was the utmost duty required.

#### SECTION THE SECOND. OF MAKING DISTRIBUTION.

BY the statute 22 & 23 Car. II. after debts and funeral expences are paid, the surplusage of intestates estates (except the estates of *femes covert*; that is, married women, to which their husbands have a right, as before mentioned\*) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: one third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if the children be dead, to their representatives, that is, their lineal descendants. But no child of the intestate (except his heir at law) on whom he settled in his lifetime any estate in lands, or pecuniary

portion, equal to the distributive shares of the other children, shall have any part in the surplusage with their brothers and sisters; but if their estates, so given them by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal<sup>f</sup>. But the heir at law shall have an equal part in the distribution with the other children, without any consideration of the value of the land, which he hath by descent, or otherwise, from the intestate.

By this statute the heir at law shall not abate, in respect of the land which he hath by descent, or otherwise, from the intestate; yet if he hath had any advancement from his father in his lifetime, otherwise than by land as aforesaid, he shall abate for the same in like manner as the other children. And so it seems that *cobereffes* shall bring together into hotchpot, such advancement (not being lands) as they shall respectively have received from their father, before they shall be entitled to recover their several distributive shares, agreeable to the general purport of the act; which is evidently to promote an equality as much as may be<sup>g</sup>.

THIS word *hotchpot* is generally understood to signify mixing and blending together, and conveys much the same idea as the words *collatio bonorum*<sup>h</sup>, which in the civil law is answerable to the word *hotchpot*, and signifies, that if a child advanced by the father, doth, after his father's decease, challenge a child's part with the rest, he must cast in all that he had formerly received, and then take out an equal share with the others<sup>i</sup>.

IN respect to borough-english lands, which by custom descend to the youngest son, as we shall again see in the ensuing chapter<sup>k</sup>; it became a point upon the statute of distribution, whether the youngest son (to whom the land descended by the custom of borough-english) should abate for these lands, or should be considered as an heir at law, who by the statute is to have a distributive share, without any al-

<sup>f</sup> Black. Com. 2 V. 315, 316.—If the intestate husband covenanted to leave his wife a certain sum, and her distributive share comes to above that sum, the latter is a satisfaction; and this hath been considered rather a per-

formance than satisfaction of the covenant. 1 P. Will. 324. Note 1. 4 edit.

<sup>g</sup> 4 Burn's Eccles. Law, 332.

<sup>h</sup> Black. Com. 2 V. 190.

<sup>i</sup> Jac. Dict. tit. Hotchpot, 10 edit.

<sup>k</sup> Pag. 100.

allowance for lands by descent. And it was ruled by Sir Joseph Jekyll, master of the rolls, that he should allow for these lands<sup>1</sup>. Yet where a man was possessed of a personal estate, and seised of a copyhold in fee, which was in the nature of borough-english, and the question was, whether the youngest son, upon whom the copyhold descended, should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children. By lord chancellor Talbot: The heir at law is the eldest son, and not the heir in borough-english; and the exception in the statute extends only to the eldest son. Yet nevertheless the youngest son, who is heir in borough-english, shall not bring the borough-english estate into hotchpot; there being no law to oblige him to do this, but only this statute, and there are no words in the statute that require it: for the statute speaketh only of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime. And it was decreed, that the youngest son should have an equal share with the other children, without regard to the value of the borough-english estate. And the former case coming after this before the lord chancellor Talbot, he reversed the decree of the master of the rolls, and decreed agreeable to this latter case<sup>m</sup>.

IN respect to what shall be an advancement, so as to come within the meaning of the statute, we may observe, it hath been determined, that small inconsiderable sums, occasionally given to a child, cannot be deemed an advancement or part thereof. Thus maintenance money, or allowance made by the father to his son at the university, or in travelling or the like, is not to be taken as any part of his advancement, this being only his education; and it would create charge and uncertainty to enquire minutely into such matters. So, putting out a child apprentice, is no part of his advancement; for it is only procuring the master to keep him for seven years instead of the parent. But the father's buying an office for the son, though but at will, as a gentle-

<sup>1</sup> Str. 935.

<sup>m</sup> Caf. Talb. 276.

man pensioner's place, or a commission in the army, these are advancements *pro tanto*, that is, for so much<sup>n</sup>. And a provision made by a marriage settlement, although it is in the nature of a purchase<sup>o</sup>, is such an advancement as that a child claiming a distributive share, shall first bring the said advancement into hotchpot. As where the father, on his son's marriage, covenanted, in case of a second marriage, to pay the first son by the first wife 500l. There was a son, and several other children of the first marriage. The father of these children died intestate; and by the court it was agreed, that the heir must bring the 500l. into hotchpot, although in nature of a purchaser under a marriage settlement<sup>p</sup>. So where a man on his marriage entered into articles, in consideration of the marriage, and of 4000l. portion, to settle an estate to raise portions for daughters, in case there were no sons; that is to say, if but one daughter the sum of 5000l. if two or more then the sum of 6000l. equally amongst them, to be paid at their respective ages of 18 years, or days of marriage, which should first happen; and 80l. a year maintenance in the mean time to each daughter. The marriage took effect; and they had issue one daughter only, and no son. Then the wife dies. Afterwards the man marries a second wife, and had by her a son and a daughter, and died intestate, leaving a personal estate to the amount of 20,000l. The daughter by his first wife, at that time, was about 12 years of age; and sometime after married one Mr. Edwards; and they brought their bill, to have an account of the personal estate of the wife's father, and their distributive share thereof. And the only question was, whether the 5000l. should not be looked upon to be so far an advancement of the plaintiff, the wife of Mr. Edwards, that if she would have any farther share of her father's personal estate, they must bring this 5000l. into hotchpot. And the court consisting of King lord chancellor, assisted by Raymond chief justice, and the master of the rolls, and Price and Fortescue justices, were all clear of opinion, that this was an advancement by the father in his lifetime, within the meaning of the statute, though contingent and future; so that she could not have that and her distributive share likewise. And accordingly the decree was pronounced<sup>q</sup>.

<sup>n</sup> 3 P. Will. 317.

<sup>o</sup> Purchase means any method of acquiring an estate otherwise than by descent. Black. Com. 1 V. 214. And where a person takes any thing from an ancestor or others by deed, will, or gift,

and not as heir at law, this is a purchase. 2 Lill. Abr. 497.

<sup>p</sup> 2 Vern. 638.

<sup>q</sup> Case of Edwards and Freeman, 1 Abr. Eq. Caf. 249.

IF the father settles a rent out of his lands upon a younger child, this is an advancement; so likewise if he by deed settles an annuity upon a child, to commence after his death, this is an advancement for so much: and by the same reason, a reversion settled on a child as it may be valued, is an advancement also. And if a child who has received any advancement from his father, shall die in his father's lifetime, leaving children; such children shall not be admitted to their father's distributive share, without bringing their father's advancement into hotchpot; as where a father had several children, and in his lifetime advanced one of them. The child, thus advanced in part, died in his father's lifetime, leaving issue. Afterwards the father died intestate, possessed of a considerable personal estate. It was ruled, that the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must have done; as that the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than the father, if living, would have been, and had claimed his distributive share. — A child, partly advanced, shall bring in his advancement only amongst the other children; so that the wife shall have no advantage of it. — It is said that whatever a child receives out of the mother's estate shall not be brought into hotchpot. As in the case of *Holt and Frederick*, 2 Peere Williams, 356. *Martha Frederick*, who married one *Holt* and survived him, had three children, two sons and a daughter, and having out of her own estate, given 1000l. to her daughter in marriage, died intestate, leaving those three children; and the question was, whether the daughter who had received this 1000l. from her mother, ought to bring it into hotchpot, before she should receive any further share of her mother's personal estate. The lord chancellor King said, it weighed with him, that the act of distribution was grounded upon the custom of *London*, which never affected a widow's personal estate; and that the act seems to include those within the clause of hotchpot, who are capable of having a wife as well as children, which must be husbands only. And so in this case (without much debate) his lordship ruled, that the daughter should not bring the 1000l. which she had received in her mother's lifetime, into hotchpot.

By what has been said, it may be perceived, that, where the intestate leaves a widow and children, or the representa-

† 2 P. Will. 141. 442.

• 2 P. Will. 569.

† 4 Burn's Eccles. Law, 339.

tives of children, one third of his personal estate shall go to his widow, and the residue to his children ; or if dead, to their representatives, that is, their lineal descendants, such of the children, or the representatives of such of them, as have been advanced as aforesaid, first bringing such advancement into hotchpot, in case they choose to claim their distributive share ; and of such advancement, when the same shall be so brought into hotchpot, the widow shall have no advantage. Now we may consider how the residue of the intestate's estate is to go to his children, or if dead to their representatives, that is, their lineal descendants. And here we may observe, the doctrine and limits of representation, as laid down in the statute of distributions, seem to have been principally borrowed from the civil law ; whereby it will sometimes happen that personal estates are divided *per capita*, as when every claimant claims in his own right ; and sometimes *per stirpes*, as when the claimants claim by representation, or in the right of another. They are divided *per capita* to every one an equal share, when all the claimants claim, in their own rights, as in equal degree of kindred, and not by representation in the right of another person". That this may be rightly understood, let us first suppose that neither of the intestate's children hath died leaving children. 2. That the intestate's children are all dead ; whether they were two, or three, or more ; each of them having left children ; as it may be, one of them two, another three, or more. 3. That some of the intestate's children are living, and some dead ; and that those who are dead have each left children.

As to the first supposition, it is sufficiently clear, that if neither of the intestate's children hath died leaving children, the residue as aforesaid, or the remaining two-thirds, after the wife has had her third, shall be equally divided between all the children of the intestate ; as in this case they all claim in their own right : and where a man marries a woman, and hath issue by her, as it may be, sons and daughters, and the wife dying, he marries another woman, by whom he hath also sons and daughters : now these, though they are called brothers and sisters, are but brothers and sisters of the half-blood ; be-

\* Black. Com. 2 V. 517.

cause they had not both but one father and mother<sup>w</sup>: yet between these no distinction is, or (as I conceive) ever was made; but in respect to collaterals<sup>x</sup>, who may take where there are no lineal descendants; there are several precedents of judgments given since the statute, allowing the half-blood to have but an half share: but now these are upon the same footing with the whole blood, in respect to what they are entitled to in the distribution of personal estate<sup>y</sup>. Yet, in respect to real estate, the whole blood is always preferred, and the half blood is no blood inheritable by descent, as we shall see in the ensuing chapter<sup>z</sup>. Where a father leaves behind him one or more children, and his widow shall happen to be with child, the child in the mother's womb will be reckoned among the children of the deceased; and if the other children should proceed to a partition of the estate, it will be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interest<sup>a</sup>. But this provision is rendered more effectual by the statute; which, as we have seen<sup>b</sup>, requires that no distribution shall be made till after the expiration of one year from the intestate's death, within which time the child will be born.

As to the second supposition, as that the intestate's children are all dead, whether they were two, or three, or more, each of them having left children, as it may be one of them two, another three, or more; in this case, where there be only grandchildren, their fathers or mothers respectively having died in the lifetime of their grandfather, the grandchildren take in their own right, and not by representation of their father or mother deceased; and the courts, where distributions are cognizable, will order an equal distribution to be made<sup>c</sup>. And thus it would be, if there were only great-grandchildren of the intestate, both his children and grandchildren having all died before him.

As to the third supposition, as that some of the intestate's children are living and some dead, and those that are dead have left children; in this case, the grandchildren take by

<sup>w</sup> Terms de Ley.

<sup>x</sup> Who these are, see pag. 77.

<sup>y</sup> 4 Burn's Eccles. Law, 357.

<sup>z</sup> Pag. 91.

<sup>a</sup> 1 Strah. Dom. 624.

<sup>b</sup> Pag. 64.

<sup>c</sup> 4 Burn's Eccles. Law, 347.



representation, and not in their own right, and the issue of each deceased child stand in the place and stead of their deceased parent. As suppose the intestate to have had three children, A, B, and C, and one of these children to be dead, as it may be A, leaving three children, and another dead, as it may be B, leaving two; then the distribution must be one third to A's three children, another third to B's two children, and the remaining third to C, the surviving child. But if C had also died, and left no issue, then A's and B's five children, being all in equal degree of kindred, would take in their own right, each of them an equal share, in like manner as is just before mentioned under the second supposition.

By this we may perceive in what manner the intestate's personal estate is to be distributed, where he has left a wife and children, or representatives of children. But before we conclude this, and proceed to another part of the statute of distributions, it may be proper to observe, that if the intestate leaves but one child, or the representative, that is, the lineal descendant of one child, such one child, or the representative of such, will be entitled to the same share in the distribution, as if there were more than one; for where there is only one person that can take, the statute vests the right in that person<sup>d</sup>. And although by the statute, no distribution is to be made within an year; yet the right of the distributive share vests immediately on the intestate's death. As where a person, intitled to a distributive share of an intestate's estate, died within a year after the intestate, it was decreed that the share of the deceased person was an interest vested and transmissible to his executors or administrators; for in this sense the statute makes a will for the intestate, and it is as if a legacy was bequeathed payable a year hence, which would plainly be an interest vested presently<sup>e</sup>.

By the statute 22 & 23 Car. II. c. 10. sect. 6. In case there be no children, nor any legal representatives of them, then one moiety of the intestate's estate is to be allotted to the wife of the intestate; and the residue to be distributed to every the next of kindred of the intestate, who are in equal degree, and those who legally represent them.

<sup>d</sup> 2 P. Will. 50.

<sup>e</sup> 3 P. Will. 49.

By sect. 7. No representation is to be admitted among collaterals after brothers and sisters children<sup>f</sup>. And in case there be no wife, then all the said estate is to be distributed to and amongst the children. And in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives, as aforesaid.

HENCE we may perceive, that where the intestate leaves no child, or any legal representative of a child, that is, lineal descendant, there the wife has a moiety, or one-half of his personal estate; and if there be no wife, then all the estate is to be distributed amongst the children; and if there be no child, then amongst the next of kindred in equal degree of or unto the intestate. But if there be a child, or representative, that is, lineal descendant, then the next of kindred will be totally excluded. For if a person dies intestate, leaving a descendant of either sex, or of whatsoever degree, such descendant is to be preferred to all ascendants and collaterals; and herein agree the civil, canon, common, and statute laws<sup>g</sup>. So if there be children, or representatives of children, and no wife, we must observe what has been before said respecting children that have been advanced, bringing such advancement into hotchpot; and then how the estate is to go to the intestate's children, or if dead, to their representatives; as here distribution must be made of the whole personal estate, in the same manner as where there is a wife, distribution must be made of two-thirds<sup>h</sup>.

THUS having proceeded, as far as relates to the intestate's widow and children, before we enter any farther into the statute of distribution, we may take notice of the statute of 1 Jac. II. c. 17. whereby it is enacted, that if after the death of a father, any of his children shall die intestate, without wife or children, in the lifetime of the mother; every brother and sister, and the representatives of them, shall have an equal share with her. Before this statute, if a child had died intestate, without a wife, child or father, the mother would have been intitled to the whole personal estate<sup>i</sup>; as the father surviving is at this day<sup>k</sup>: and the reason of making this statute was, because

<sup>f</sup> See this explained page 77.

<sup>g</sup> 4 Burn's Eccles. Law, 346.

<sup>h</sup> See pag. 70—73.

<sup>i</sup> 4 Burn's Eccles. Law, 349.

<sup>k</sup> 2 P. Will, 48.

the mother might marry and carry away all to another husband<sup>1</sup>. Upon this statute it has been determined, that where, after the death of the father, the son died intestate without issue; but leaving a wife, a mother, three brothers, a sister, and two nieces, the children of a deceased brother; that this is within the statute, and that the intestate's wife shall have but one moiety; and as to the other moiety, the intestate's brothers and sisters, and the two nieces, shall come in for an equal share with the mother<sup>m</sup>. But if there be no brother or sister, or representative of brother or sister, then it is out of the statute, and the mother shall have the whole, as she had before the making of it<sup>n</sup>. Hence it is obvious, that if a child dies without issue, then comes in the father; if the father be dead, then come in the mother, brothers, and sisters; but, if there be no brother or sister, or representative of a brother or sister, which must be a child or children (as has been determined upon the construction of the statute of Car. II.<sup>o</sup>, and it is the same in respect of this statute of Jac. II.<sup>p</sup>); then the mother takes the whole, or the half where there is a wife, and the whole where there is no wife: as the father always doth if living, and that in exclusion of the intestate's brothers and sisters, and their children. — A brother or sister of the half blood shall have an equal share with those of the whole blood<sup>q</sup>. And upon the construction of the statute of Car. II. it has been determined that a *posthumous* brother or sister, or brother or sister born after the father's death, shall share equally with the other brothers and sisters<sup>r</sup>. But upon the construction of this statute of Jac. II. it was a question whether a *posthumous* sister was entitled to a share of her brother's personal estate equally with her mother? and after many arguments had thereon, lord chancellor Hardwick decreed for the *posthumous* sister<sup>s</sup>.

<sup>1</sup> 1 Salk. 251.

<sup>q</sup> Com. Dig. Administration (H).

<sup>m</sup> 2 P. Will. 344.

<sup>r</sup> Case of Burnet and Man, Vez.

<sup>n</sup> 4 Burn's Eccles. Law, 362.

156.

<sup>o</sup> See pag. 77.

<sup>s</sup> Case of Wallis and Hodson,

<sup>p</sup> Case of Stanley and Stanley, 4 Burn's Eccles. Law, 365.

<sup>i</sup> Atk. 458.

IN respect to how distribution is to be made, between the intestate's mother, brothers, and sisters, we may observe that, each of these share alike; as where a man died intestate, and without issue, leaving a wife and several brothers and sisters, and his mother living, the wife, under the statute of Car. II. takes a moiety; and a question arising upon the statute of Jac. II. how the other moiety should be distributed, whether the mother should have the whole, or only a distributive share with the brothers and sisters; a bill was brought, in order to have the opinion of the court. Upon a hearing, the lord chancellor King was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety, with the brothers and sisters of the intestate; for the intent of the statute was, to put the mother (who before stood upon the same footing with the father) in the same state and condition with these collaterals; so that whenever she is intitled, they shall have an equal share with her<sup>t</sup>. But where a man died intestate, leaving a wife, and a mother living, and children of a brother deceased; these children, as representatives of their father, bringing a bill to have one half of the moiety of the intestate's estate, the wife being intitled to the other moiety, and the mother (as they insisted) to have only an equal share with them; lord chancellor Hardwicke ordered the residue of the intestate's estate, after satisfaction of debts, to be divided into four equal parts; two fourth parts thereof to go to the widow, one-fourth to the mother, and one-fourth to the brother's children<sup>u</sup>.—If a brother or sister is living, and also children of a deceased brother or sister, such children will take *per stirpes* as hereafter mentioned (p. 81.)

HAVING proceeded thus far with the statute of 1 Jac. II. we may now return to that part of the statute of distributions that relates to collaterals, and the intestate's next of kindred in equal degree, so proceed gradually from the nearest to the most distant relations; and here we may first take notice of what is said relative to collaterals, and then, of what is said relative to the intestate's next of kindred, in equal degree. As to collaterals the statute says, "There is no representation

<sup>t</sup> Case of Keilway and Keilway,  
T. 12 Geo. II. Str. 710.

<sup>u</sup> Case of Stanley and Stanley, May  
14, 1739. 1 Atk. 458.

admitted among collaterals after brothers and sisters children." Upon these words of the statute, where the question was, whether these words were intended of brothers and sisters to the intestate, or whether, when distribution falls out amongst brothers and sisters, though remote relations to the intestate, representation should be admitted amongst them? it was held, that representation should only be between the brothers and sisters to the intestate<sup>w</sup>. And this representation amongst brothers and sisters does not extend to their grandchildren. For where the persons claiming distribution were a deceased brother's daughter, and the grandchildren of another deceased brother; it was held that the deceased brother's daughter only was intitled; and that a deceased brother's or sister's grandchildren should not come in with a deceased brother's or sister's children<sup>x</sup>. And as to representation among other relations: where a man died without wife or child, brother or sister, and his next of kin were an uncle by his mother's side, and a deceased aunt's child; upon a demurrer, the court of chancery allowed the uncle to have the whole, and the deceased aunt's child nothing<sup>y</sup>; and though this may seem hard, yet, as the lord chancellor said in this case, so is the law.

As to the part of the statute where it is said, "The next of kindred in equal degree of or unto the intestate, and their legal representatives;" by what has been just mentioned it may be perceived, that these words, "their legal representatives," are wholly confined to the intestate's brothers and sisters, and that no representation is admitted among collaterals after brother's and sister's children; by which the number of persons intitled are less than they otherwise would be.—We may now consider who are those next of kindred in equal degree of or unto the intestate, that may be intitled to his estate? and here we may observe that, kindred are distinguished either by the right line or by the collateral. The right line is of parents and children, computing by ascendants and descendants; the collateral line is between brothers and sisters, and the rest of the kindred, among themselves. Those of the right line are reckoned upwards as parents, or downwards as children; those of the collateral line

<sup>w</sup> Case of Maw and Harding, 2 Vern. 233.

<sup>x</sup> Case of Pett and Pett, 1 P. Will, 25. 1 Salk. 250.

<sup>y</sup> Case of Bower and Littlewood, 1 P. Will, 594.

are reckoned *ex transversa*, or side-ways, as brothers and sisters, uncles and aunts, and such as are born from them<sup>2</sup>. Amongst those there are different degrees of kindred, which are differently reckoned by the civil and canon laws, yet in the ascending and descending lines, the degrees are the same by both laws; but in the collateral line they differ<sup>3</sup>. And for the distribution of personal estate, those degrees of kindred are reckoned according to the computation of the civil law; and not of the canon law, which the law of England adopts in the descent of real estates<sup>4</sup>. In the descending line, the son is in the first degree, the grandson in the second, and the great grandson in the third. In the ascending line, the father is in the first degree, the grandfather in the second, and the great grandfather in the third. In the collateral line, as reckoned according to the computation of the civil law, we ascend first to the father, which is one degree; from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, or uncle's child, which is the fourth degree. So again we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third degree; and from the nephew to the son of the nephew, which is the fourth degree<sup>5</sup>.

How some of those degrees of kindred will be intitled to the intestate's personal estate, will be seen by the following adjudged cases; which, after being related, some observations will be made concerning the persons who will be intitled to such personal estate, pursuant to the statutes of 22 & 23 Car. II. and 1 Jac. II. and thereby we may have a brief and comprehensive view of them.

IN many cases where it hath happened, that the next of kindred to the intestate were a grandfather and a brother, suits have been commenced to determine their right; but

<sup>2</sup> Ayliffe's Parergon, 327.

<sup>3</sup> 4 Burn's Ecclef. Law, 343.

<sup>4</sup> Black. Com. 2 V. 504.

<sup>5</sup> 4 Burn's Ecclef. Law, 348.

now this point seems to be fully determined, in consequence of three determinations, the first of which was in the case of *Pool* and *Wilshaw*, T. 1708. The second in the case of *Norbury* and *Vicars*, before Fortescue, master of the rolls, M. 1749; and the third was delivered by lord chancellor Hardwick, in the case of *Evelyn* and *Evelyn*, H. 1754, and determined in favour of the brother, in exclusion of the grandfather. In delivering the determination of the court in this case. By lord chancellor Hardwick: this case is between the grandfather and brother of the deceased. It is insisted on behalf of the grandfather, that he is in equal degree of consanguinity with the brother of the deceased, and intitled to an equal share of his estate, under the statute of distribution. The statute says, that the ordinary (in case there shall be no wife, children, or childrens children) shall make a just and equal distribution among the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro sui cuique jure*, “ according to the laws in such cases, and the rules and limitations hereafter set down.” Which limitation is only a particular specification, in what cases representation shall be allowed; and there is nothing more expressed in the statute, than that the estate shall be distributed equally to every the next of kin to the intestate, who are in equal degree.—This point has been already twice determined in courts of equity. First in the case of *Pool* and *Wilshaw*, and afterwards in the case of *Norbury* and *Vicars*. But it has been insisted on for the grandfather, that both these decrees are erroneous. Notwithstanding I shall adhere to the determination of the case of *Pool* and *Wilshaw*, I have seen the lord chief baron Ward’s and Mr. baron Price’s reports of this case; and also that of Mr. Dodd (afterwards chief baron). The last of which, though but short, is the clearest of the three. It was a bill brought by the grandmother, for a share of her grandson’s estate, equally with his brother. And it was insisted on for her, that she was in equal degree of consanguinity, and equally intitled; but the reporter says, “ All the court contrary, and there has been no such usage since the making of the statute.” And I know of none since; though it is

83 years since that statute was made. The subsequent decree at the rolls was conformable to this; and therefore I shall not attempt to overthrow these determinations. And after a full discussion of the subject, the lord chancellor concludes, by saying, that since not only the reasons are on this side the question, but the determinations have been that way, and to overthrow them would tend to introduce inconveniencies, as it might disturb distributions already made, which is an argument of the greatest weight in the law, I shall determine this point in favour of the brother, to the exclusion of the grandfather<sup>d</sup>.

WHERE the intestate leaves a grandmother and an aunt, the grandmother will be intitled in exclusion of the aunt; and as to this, lord chief justice Holt said, that as by the common law father and mother were nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt. And the grandmother is the root of the kindred, whereas the aunt is only a branch<sup>e</sup>. So in a cause in the court of chancery, it was clearly agreed, that if one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is intitled to the personal estate, in exclusion of the uncles and aunts<sup>f</sup>.—Where the next of kindred to the intestate were a grandfather by the father's side, and a grandmother by the mother's, it was decreed, that they shall take in equal moieties, as being in equal degree; for though the grandfather by the father's side may in some respects be more worthy of blood, yet in this respect dignity of blood is not material<sup>g</sup>; though it is in respect of the descent of lands, as we shall see in the ensuing chapter<sup>h</sup>.—Where the intestate left two aunts, and a nephew, and a niece, children of a deceased brother, lord chancellor Hardwick ordered the surplus to be divided into four parts equally amongst them, they being all in equal degree, and therefore the children do not take by representation, but in their own right; but if the father of the nieces had been living, he would have taken the whole<sup>i</sup>.

<sup>d</sup> 4 Burn's Ecclesl. Law, 351.

<sup>g</sup> 1 P. Will. 53.

<sup>e</sup> Case of Blackborough and Davis,

<sup>h</sup> Pag. 87.

1 Salk. 38. 351. 12 Mod. 623. 1 P.

<sup>i</sup> Case of Durand and Prestwood,

Will. 51.

1 Atk. 455.

<sup>f</sup> Case of Woodroffe and Wickworth,  
Prec. Cha. 527.



HERE, as was proposed, we may observe, who those persons are that will be entitled to the intestate's personal estate, pursuant to the statutes of the 22 & 23 Car. II. and 1 Jac. II. As in the first instance, where a man dies leaving a wife and children; the wife has a third, the children and the representatives of deceased children the other two thirds<sup>k</sup>. 2. If there be no wife, the children, and representatives of deceased children, have the whole; and that in exclusion of all ascendants and collaterals whatever<sup>l</sup>. 3. In case there be no child, or representative of any child, that is, lineal descendant; then the wife has always one half, whoever has the other half<sup>m</sup>. 4. If there be no wife nor lineal descendant, then the intestate's father, if living, has the whole<sup>n</sup>. 5. If the father be dead, then the intestate's mother, brothers and sisters, and the children of the deceased brothers and sisters (if any), have the whole<sup>o</sup>. 6. If there be no brother or sister of the intestate, or child of a brother or sister, then the mother has the whole<sup>p</sup>. 7. Where the deceased leaveth neither wife nor child, nor representative of such child, nor father, nor mother; but leaves brothers and sisters, and children of other brothers and sisters deceased; the brothers and sisters, and the children of the brothers and sisters deceased, have the whole, and the children of the brothers and sisters deceased take *per stirpes*, and not *per capita*; for the children of the deceased, being not equal in degree with their uncles and aunts, do take in this case, not in their own rights, but by way of representation of their parents deceased. As if there had been three brothers of the deceased, A, B, and C; and A had died, leaving three children, and B leaving two; the distribution must be one third to A's three children, another third to B's two children, and the remaining third to C the surviving brother. But if the three brothers had all been living, then the intestate's estate must have been divided into three equal portions, and distributed *per capita*, one to each, as has been said concerning the intestate's children and grandchildren<sup>q</sup>.—Where all the brothers and sisters of the intestate are dead, some having left children, as it may be, some a greater, others a less number; those

<sup>k</sup> Pag. 70—73.

<sup>l</sup> Pag. 74.

<sup>m</sup> Pag. 73—75.

<sup>n</sup> Pag. 74, 75.

<sup>o</sup> Pag. 75, 76.

<sup>p</sup> Pag. 75.

<sup>q</sup> Pag. 71—73.

children of the brothers and sisters deceased, take *per capita* each an equal share, as has been observed before respecting the intestate's grandchildren<sup>r</sup>. 9. If a person die intestate, leaving neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, but hath a grandfather or grandmother living; then the grandfather or grandmother has the whole personal estate, in exclusion of the intestate's uncles and aunts; and if there be a grandfather on the father's side, and a grandmother on the mother's side, the whole is divided between them; and so it is if there be a grandmother on the father's side, and a grandfather on the mother's side<sup>s</sup>. 10. If a person die intestate, leaving neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor grandfather nor grandmother, but leaving uncles and aunts, and brother's or sister's children; those uncles and aunts, whether on the father's side or mother's, will share the intestate's whole personal estate, together with his brother's and sister's children<sup>t</sup>.

If a person die intestate, leaving none of those relations, the general rule by the statute of distribution is, that his personal estate shall go to his next of kindred in equal degree; and those may be the children of his uncles or aunts, and his brothers or sisters grandchildren, all of whom being in the fourth degree, will share equally alike; and if there is but one person that can take, as being the only person who is the nearest of kin, the statute vests the whole in that person<sup>u</sup>.—For further discovering the degrees of kindred, when none of those that have been mentioned are to be found, we may observe the following table, which is laid down conformable to what has been before mentioned respecting the mode in which the different degrees of kindred are to be reckoned. We may likewise observe, that where there are relations, both by the father's side and mother's, in equal degree

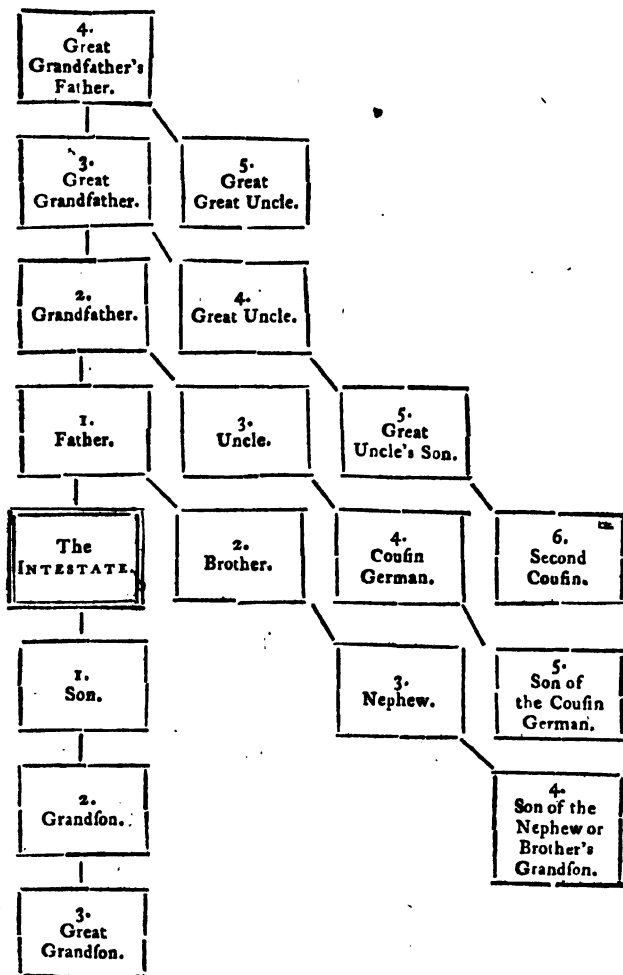
<sup>r</sup> Pag. 72.

<sup>s</sup> Pag. 80.

<sup>t</sup> *Ibid.*

<sup>u</sup> Pag. 73.

of kindred, they share equally alike ; for here there is no difference (though there is in respect of real estate, as will be seen in the ensuing chapter), whether the relations be by the father's side or by the mother's ; but those who are nearest of kin will be preferred, be it by either side<sup>w</sup> ; and the half blood will be equally entitled with those of the whole blood.



IF the intestate have no kindred, his real estate, which will be the subject of our ensuing chapter, will escheat to the King, or to the lord of the manor, or other person entitled thereto, by virtue of any grant from the Crown; for where no person can claim any property, there the King shall be entitled by his prerogative. As to personal estate, concerning which we have been treating; where a bastard who has no kindred, being, as the law terms him, *nullius filius*, that is, the son of no one, or as he is sometimes termed, *filius populi*, that is, the son of the people (or any one else that has no kindred), dies intestate, and without wife or child, it hath formerly been held, that the ordinary might seize his goods, and dispose of them in *pious usus*, or in pious uses. But the usual course now is, for some one to procure letters patent, or other authority from the King; and then the ordinary of course grants administration to such appointee of the Crown<sup>z</sup>.

HENCE it may be perceived, that a bastard is utterly incapable of taking any real estate by descent, and that he cannot be heir to any one; neither can he be entitled to any share in the distribution of an intestate's personal estate: when born he is capable of taking by devise, and the lawful issue of a bastard is capable of inheriting or taking by descent or otherwise such estate as the parent might die possessed of, but no person except his wife or lawful issue can claim any part of his estate as kindred; for he can have no collateral kindred.—Bastards are children born out of wedlock, or before matrimony; but if a child be begotten while the parents are single, who afterwards marry, and thereby the child is born in lawful wedlock, he is no bastard<sup>y</sup>. And children born so long after the death of the husband, that by the usual course of gestation, they could not be begotten by him, are bastards. But this being a matter of some uncertainty, the law is not exact as to a few days<sup>z</sup>. So children born during wedlock may in some circumstances be bastards: as in case the husband be out of the kingdom of England (or, as it is commonly phrased, without the four seas) for above nine months, so that access to his wife cannot be presumed, her issue, during that period, will be bastards<sup>a</sup>. But generally during the coverture access of the husband is presumed, unless the contrary be proved<sup>b</sup>. In case of a divorce in the spiritual court *a vincula matrimonii*, or from the band of ma-

<sup>z</sup> Black. Com. 2 V. 305.

<sup>y</sup> Co. Litt. 244.

<sup>z</sup> Cro. Jac. 545.

<sup>a</sup> Co. Litt. 244.

<sup>b</sup> 8 P. Will. 276. Str. 925.

trimony, all the issue born during the coverture are bastards; for such an absolute annulling of the marriage can only take place where some cause is shewn, which made the marriage unlawful from the beginning.

BESIDES what has been mentioned concerning bastards, it should be observed, that it must be consanguinity or relationship by blood, and not affinity, a relationship by marriage, whereby persons may be entitled as kindred to an intestate's estate; for as to such as have married with any of the intestate's family or relations who have died before him, no advantage can accrue to them by such marriage: for example, suppose A, was to die intestate, and the only issue he ever had were a son and a daughter, both of whom had married and died before him, leaving a wife and husband, who survived him; neither this wife nor husband would have any part of A's real or personal estate, though the issue of his son and daughter, with his wife (if such were living), would have the whole; but if none of them were living, the whole personal estate would go to his next of kindred in such manner as has been shewn, and the real estate to such as are described in the ensuing chapter. And if A had died intestate without wife or child, and his only kindred had been a brother and sister, both of whom had married and died before him, leaving a wife and husband, who had survived him; neither this wife nor husband would be entitled to any part of A's estate; but in this case he would die without kindred, and his real estate would escheat to the King, or lord of the manor, or other person who might be entitled thereto by virtue of any grant from the Crown, and his personal estate would vest in the King, as we have lately hinted; and thus it would be in respect to the husband of A's mother, and the husband or wife of any one that were his next of kin, and had married and died before him. But in case his son or daughter, brother, sister, or mother, or any other who were his next of kin, had survived him, and died in ever so short a time after, then the husband or wife of him, or she that had survived him, might be entitled; that is, the husband in right of the wife, and the wife in respect of her husband; but neither of them as being of kin to A. The right of the distributive share vests immediately on the intestate's death, as hath been mentioned<sup>c</sup>. Although by the statute no distribution is to be made within a year; yet the share of the deceased person is an interest vested and transmissible to his executors or administrators.

<sup>c</sup> Pag. 73.

## C H A P. IV.

*The Descent of real Estates, or Estates of Inheritance. How the Law disposes thereof to the Heir; the Husband of a deceased Wife, and the Wife of a deceased Husband.*

## SECTION THE FIRST.

## HOW THE LAW DISPOSES OF THE INHERITANCE TO THE HEIR.

ALL freehold estates are called real estates, and may be of inheritance or not of inheritance, as mentioned page 28. The principal freehold estates of inheritance are fee-simple, and fee-tail. There are also estates of inheritance, which descend according to the custom of gavelkind, borough-english, and the customs of manors, yet do not all come under the legal description of freehold; with those latter, as well as the former, an administrator, as such, has no concern, except it be with the estate held *pur autre vie* (mentioned page 30). To avoid confusion, those latter estates will be defined towards the end of this chapter.—Fee-simple is where a man hath lands, tenements, or hereditaments, (the latter of which comprehend not only all kinds of ground, as arable or plowed ground, meadows, pastures, woods, moors, marshes, and all kinds of houses, edifices, or buildings, which are called corporeal hereditaments, but also advowsons or rights of presentation to churches, commons, ways, offices, dignities, pensions, annuities, and rents, which are called incorporeal hereditaments<sup>a</sup>); to hold to him and his heirs for ever, generally, absolutely, and simply, without any particular heirs being mentioned, but that being referred to his own pleasure, or the disposition of the law, in case he makes no disposition thereof himself, as he may to whom he thinks fit. And hence we may perceive, that this estate may consist both of corporeal and incorporeal hereditaments, or either. But no person can be properly such an ancestor, as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold; or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson, and the like<sup>b</sup>. And therefore all the cases which will be hereafter

<sup>a</sup> Mentioned page 24.<sup>b</sup> Black. Com. 2 V. 209.

mentioned (respecting descent to the heir), are upon the supposition that the deceased was the last person actually seised of the inheritance. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself which is to be transmitted to his heir <sup>c</sup>.

DESCENT, or hereditary succession, is a title whereby a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate so descending to the heir, is in law called the inheritance. The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance, and the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descent is broken and altered, perpetually refer to this settled law of inheritance, as a *datum*, or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. It may be perceived, that this is an estate confined in its descent, to such heirs only of the donee as have sprung, or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point, that we must resort back to the standing law of descents in fee-simple to be informed of <sup>d</sup>.—Concerning fee-tail, more will be said in the two subsequent sections. A brief description thereof, see p. 115.—In order to obtain a right conception of the law of descents in fee-simple, which will now be treated on alone, it will be necessary to observe the following rules:

THE first rule is, that inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum*, or for ever; but shall never lineally ascend. When therefore a person dies so seised, the inheritance first goes to his issue: as if there be A, B, and C, grandfather, father, and son; and B the father purchases land and dies; his son C shall succeed him as heir, and not A the grandfather; to whom the land shall never ascend, but shall rather escheat to the lord <sup>e</sup>.

THE second rule is, that the male issue shall be admitted before the female. Thus sons shall be admitted before daugh-

<sup>c</sup> Black. Com. 2 V. 209.

<sup>d</sup> *Ibid.* 201.

<sup>e</sup> Littleton, sect. 3.

ters. As if A hath two sons, C and D, and two daughters, E and F, and dies; first C, and (in case of his death without issue) then D, shall be admitted to the succession in preference to both the daughters <sup>f</sup>.

THE third rule is, that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together. As if a man hath two sons, A and B, and two daughters, C and D, and dies; A his eldest son shall alone succeed to his estate, in exclusion of B the second son and both the daughters; but if both the sons die without issue before the father, the daughters C and D shall both inherit the estate as co-parceners <sup>g</sup>.

THE fourth rule is, that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. Thus the child, grandchild, or great grandchild (either male or female) of the eldest son, succeeds before the younger son, and so *in infinitum* <sup>h</sup>. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, A and B, and A dies leaving six daughters, and then J. S. the father of the two sisters dies without other issue, these six daughters shall take among them exactly the same as their mother A would have done, had she been living; that is, a moiety, or one half of the lands of J. S. in coparcenary: so that upon partition made, if the land be divided into twelve parts, B the surviving sister shall have six thereof, and her six nieces the daughters of A one apiece <sup>i</sup>.

THIS taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. For example, suppose the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third; his inheritance by the law of England will be divided into three parts, and distributed *per stirpes*, thus; one third to the three children who represent one sister, another

<sup>f</sup> Hale's History of the Common Law, 235. Black. Com. 2 V. 213.

<sup>h</sup> Hale, 236, 237. Black. 2 V. 216.

<sup>i</sup> Black. 2 V. 217.

<sup>g</sup> Hale, 238. Black, 2 V. 214.



third to the two who represent the second, and the remaining third to the one child, who is the sole representative of her mother<sup>k</sup>. This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males<sup>l</sup>. The issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same<sup>m</sup>. Among these several issues, or representatives of the respective roots, the same preference to males, and the same right of primogeniture, or first birth obtain, as would have obtained at first among the roots themselves, the sons or daughters of the deceased. As if a man hath two sons, A and B, and A dies, leaving two sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate: and if A had left only two daughters, they should have succeeded also to equal moieties, or halves of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son, who is younger than his sister: here, when the grandfather dies, the eldest son of C shall succeed to one third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his eldest sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downward *in infinitum*<sup>n</sup>.

THE fifth rule is, that on failure of lineal descendants, or issue of the person last seized, the inheritance shall descend to the blood of the first purchaser, subject to the three preceding rules. Thus, if G. S. purchases land, and it descends to J his son, and J dies seized thereof without issue, whoever succeeds to this inheritance must be of the blood of G. S. the first purchaser of this family<sup>o</sup>. The first purchaser is he who first acquired the estate to his family, whether the same was transferred to him by sale, or by gift, or by any other method except only that of descent<sup>p</sup>. This is the principle

<sup>k</sup> Black. Com. 2 V. 217.

<sup>l</sup> *Ibid.* 218.

<sup>m</sup> Hale, H. C. L. 237, 238. Black.

<sup>n</sup> 2 V. 218.

<sup>o</sup> Black. 2 V. 218, 219.

<sup>p</sup> Hale, 217. 229. Black. 2 V. 220.

<sup>p</sup> Black. 2 V. 220.

upon which the law of collateral inheritances depends ; that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser<sup>a</sup> ; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended. As if A dies without issue, his estate shall descend to C his brother, who is lineally descended from D his next immediate ancestor or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of A, the lineal descendant of his grandfather, and so on *in infinitum*<sup>r</sup>.

HERE we must observe, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore the father, or other lineal ancestor, is himself said to be the heir, though long since dead, as being represented by the persons of his issue ; who are held to succeed not in their own rights, as brethren, uncles, &c. but in right of representation, as the offspring of the father, grandfather, &c. of the deceased. But though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an immediate descent ; and therefore title may be made by one brother or his representatives to or through another, without mentioning their common father. If G hath two sons J and F, F may claim as heir to J, without naming their father G, and so the son of F may claim as cousin and heir to M the son of J, without naming the grandfather, *viz.* as son of F, who was the brother of J, who was the father of M. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood : and therefore, in order to ascertain the collateral heir of J, it is in the first place necessary to recur to his ancestors in the first degree, and if they have left any other issue besides J, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in

<sup>a</sup> Hale, H. C. L. 242, 243. Black.     <sup>r</sup> Black. 2 V. 225.  
Com. 2 V. 223.

the third and fourth, and so upwards *in infinitum*, till some ancestor be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of J must derive his descent; and in such derivation the same rules must be observed with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descent from the person of the last proprietor<sup>2</sup>.

HERE again we must observe, in respect to collateral inheritances, that the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded<sup>3</sup>.

A KINSMAN of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. As if the blood of J. S. was composed of those of G. S. his father, and L. B. his mother, therefore his brother F, being descended from both the same parents, hath entirely the same blood with J. S. or he is his brother of the whole blood. But if after the death of G. S. L. B. the mother marries a second husband L. G. and hath issue by him; the blood of this issue, being compounded of the blood of L. B. (it is true) on the one part, but that of L. G. instead of G. S. on the other part, it hath therefore only half the same ingredients with that of J. S.: so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord<sup>4</sup>. Nay even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue, still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised; but, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the person last actually seised<sup>5</sup>.

<sup>2</sup> Black. Com. 2 V. 226.

<sup>3</sup> *Ibid.* 227.

<sup>4</sup> *Ibid.*

<sup>5</sup> Hale, H. C. L. 238, Black. 2 V. 227.

IN collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female <sup>x</sup>) unless where the lands have, in fact, descended from a female <sup>y</sup>. Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on <sup>z</sup>. Yet whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by his father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so, *converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also if they in fact descended to J. S. from his father's mother C. K.; here not only the blood of L. B. his mother, but also of G. S. his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from F. H. the mother of C. K. the line not only of L. B. and of G. S. but also of L. K. the father of C, is excluded <sup>a</sup>. Whereas when the side from which they descended is forgotten, or never known (as in the case of an estate newly purchased to be holden *ut feudum antiquum*, or as a feud of indefinite antiquity; as all the estates held in fee-simple throughout the kingdom are held <sup>b</sup>), the right of inheritance runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side, leaving no place untried, in order to find heirs that may, by possibility, be derived from the original purchaser. The greatest probability of finding such was among those descended from the male ancestors; but upon failure of issue there, they may possibly be found among those derived from the females <sup>c</sup>.

FROM what has been here said, the reader may form an idea of the law of descents in fee-simple; and for a more full and perspicuous view thereof, we shall refer to the learned authors here cited, especially to the commentaries of judge Blackstone; where it need not be said this subject is amply

<sup>x</sup> Hale, H. C. L. 241. Black. Com.

<sup>a</sup> Black. 2 V. 236.

<sup>z</sup> V. 234.

<sup>b</sup> *Ibid.* 222,

<sup>y</sup> Black. 2 V. 234.

<sup>c</sup> *Ibid.* 236.

<sup>a</sup> Hale, 242. Black. 2 V. 334.

treated on, as it is well known, by the book being in the hands of most of the profession of the law, as well as of many of the nobility and gentry throughout the kingdom; on which account, and for its repute and authenticity, it has hitherto been frequently cited instead of other authors.

As to the heir, he is much favoured by the law; as not being liable to pay any simple contract debts due from the deceased, not even if the estate was purchased with the money for which the simple contract debts are due<sup>d</sup>. And in case the estate is mortgaged, if the deceased have left enough personal estate to discharge all his debts, the real estate must be redeemed for the benefit of the heir<sup>e</sup>. But where the deceased has not left a sufficiency of personal estate to discharge all his debts, the real estate will be liable to answer those due by bonds and special contracts, whereby he hath bound himself and his heirs; and this estate descending from the deceased ancestor, who hath thus bound himself and heirs, will be real *assets*, or *assets* by descent, mentioned in a former chapter<sup>f</sup>. And where the real estate is given to any person. By the statute of the 3 W. & M. c. 14. it is enacted, that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments; or of any rent, profit, term, or charge, out of the same, whereof any person at the time of his decease shall be seised in fee-simple, in possession, reversion, or remainder, or hath power to dispose of the same by his last will and testament; shall be deemed and taken to be fraudulent, and absolutely void and of none effect, against such persons, their heirs, successors, executors, administrators, and assigns, to whom the deceased shall, by bonds or other specialties, have bound himself and his heirs: and all such creditors may have and maintain actions of debt upon their bonds and specialties, against the heir at law of the obligor and such devisee jointly. Yet it is provided, that, where there shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real or just debts; or any portions or sums of money for any child or children of any person, other than the heir at law, *according to any marriage contract or agreement in writing, bona fide made before such marriage*, the same shall be in full force; and the same manors, mes-

<sup>d</sup> Black. Com. 3 V. 430.

<sup>e</sup> Mentioned in page 54.

<sup>f</sup> Page 45.—Wherein personal estate

may be exempt from going in discharge of the real. See page 202.

suages, lands, tenements, and hereditaments, shall be holden and enjoyed by every such person, his heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise, or disposition was made, and by his trustee or trustees, their heirs, executors, administrators, and assigns, for such estate or interest as shall be limited or appointed, devised or disposed, until such debt or portion shall be raised and paid.—And where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him; it is enacted, that such heir at law shall be answerable for such debt, in an action of debt, to the value of the land so by him sold, aliened, or made over; in which case all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment so obtained against such heir, to the value of the said land, as if the same were his own proper debt; saving that the lands, tenements, and hereditaments *bona fide* aliened before the action brought, shall not be liable to such execution.

## SECTION THE SECOND.

## HOW THE LAW DISPOSES OF A WIFE'S REAL ESTATE; OR THE LAW CONCERNING A TENANCY BY THE CURTESY OF ENGLAND.

**W**HERE a man taketh a wife seised of an estate in fee-simple, or fee-tail, and hath issue by her; although the issue afterward die or live, the husband shall hold the land during his life, as tenant by the curtesy of England<sup>a</sup>. To make a tenancy by the curtesy, these four requisites are necessary; marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife, which must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed: therefore a man shall not be tenant by the curtesy of a remainder or reversion<sup>b</sup>. But entry is not always necessary to give seisin in deed; for if the land is in lease for years, curtesy may be without entry or even receipt of rent, the possession of the lessee for years being deemed the possession of

<sup>a</sup> Co. Litt. 29.<sup>b</sup> Black. Com. 2 V. 127.

husband and wife<sup>c</sup>. And of some hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife; as in the case of an advowson, where the church has not become void in the lifetime of the wife; which a man may hold by curtesy, because it is impossible to have had actual seisin of it, and *impotentia excusat legem*<sup>d</sup>, or impotency excuseth the law. And though, in strictness of law, there cannot be curtesy of trusts; yet the courts of equity have allowed curtesy both of trusts and other interests, which, though in law mere rights and titles, are deemed estates in equity. However, a wife, in point of benefit, may have a trust of inheritance which may be so declared as to prevent curtesy; as by directing the profits during the wife's life to be paid to her separate use<sup>e</sup>.—If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands; for the king, by prerogative, is intitled to them, the instant she herself has any title<sup>f</sup>.—3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake<sup>g</sup>; crying indeed is the strongest evidence of its being born alive, but it is not the only evidence<sup>h</sup>. The issue must also be born during the life of the mother; for, if the mother dies in labour, and the Cæsarean operation is performed, the husband, in this case, shall not be tenant by the curtesy: because, at the instant of the mother's death, he was clearly not intitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb: and the estate, being once so vested, shall not afterwards be taken from him<sup>i</sup>. The issue that must be so born alive, as has been observed, must also be capable of inheriting the mother's estate<sup>k</sup>. Wherefore, if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby intitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male, and if a woman be delivered of a monster, which hath not human shape, he is not capable of inheriting; yet, if he hath human shape, though deformed in body, he is capable<sup>l</sup>. The time when the issue was born is immaterial, provided it is born during the coverture; for whether it be born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy<sup>m</sup>.—4. By the death of the wife (after issue had as before observed) the hus-

<sup>c</sup> Co. Litt. 29. Note 3. 13 Edit.

<sup>d</sup> Black. Com. 2 V. 127.

<sup>e</sup> Co. Litt. 29. Note 6, 13 Edit.

<sup>f</sup> Black. Com. 2 V. 127.

<sup>g</sup> *Ibid.*

<sup>h</sup> 8 Co. Rep. 34.

<sup>i</sup> Co. Litt. 29.

<sup>k</sup> Black. Com. 2 V. 128.

<sup>l</sup> Co. Litt. 29.

<sup>m</sup> *Ibid.*

band becomes tenant by the curtesy, and not before<sup>a</sup>. Yet by the birth of a child, he becomes tenant by the curtesy *initiate*, and may do many acts to charge the lands, but his estate is not *consummate* till the death of the wife<sup>c</sup>.

By becoming tenant by the curtesy, the husband is intitled to hold the estate during his life, and immediately after his death the same must inevitably go to the heir, whether he be a child or distant relation of the wife: and this the husband, as being only tenant by the curtesy, can in no wise prevent; for he cannot alien this estate for any longer term than his own life: wherefore, and for that it may so happen, the husband, on the death of the wife, may have no further benefit from the estate, of which during his wife's life he hath been intitled to the rents and profits; a tenancy by the curtesy seldom happens, where the wife is seised in fee-simple at any time during her coverture; for although she cannot devise this estate by will, as being restrained by the statute of 34 & 35 Hen. VIII. c. 5. neither will the law permit her to convey it to her husband or any other person whatever. For all deeds executed, and acts done by her during her coverture, are void; except it be a fine, or like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary<sup>d</sup>. Yet by a fine, in which she and her husband must join, the estate may be conveyed and assured to any person or persons, for such uses and purposes as the husband and wife shall think fit. So likewise may such estate whereof the wife is seised in fee-tail general, if there is no remainder or reversion expectant thereon, for barring of which a recovery must be suffered as more particularly mentioned, page 242.

### SECTION THE THIRD.

#### HOW THE LAW DISPOSES OF AN HUSBAND'S REAL ESTATE; OR THE LAW CONCERNING A TENANCY IN DOWER.

**T**HE wife is entitled by law to be endowed of one-third part of all such lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture or marriage; to hold the same during the term of her natural life<sup>e</sup>. But that she might be entitled thereto,

<sup>a</sup> Co. Litt. 30.

<sup>c</sup> Black. Com. 2 V. 128.

<sup>d</sup> *Ibid.* 1. V. 444.

<sup>e</sup> Co. Litt. 31. The husband being legally seised in fee-simple or fee-tail during the coverture entitles the wife to dower, but if he before marriage puts the legal estate out of him, or after mar-

riage purchases an estate and takes a conveyance in his own name and a trustee's, the wife will be excluded; as see p. 98, 99. And the wife cannot be entitled to dower out of an estate, which at the time of her marriage was subject to a mortgage in fee. Co. Litt. 208, Note 1. 13 Edit.



she must be the wife of the party at the time of his decease ; for if she be divorced *a vinculo matrimonii*, that is, from the band of matrimony, she shall not be endowed ; for *ubi nullum matrimonium ibi nulla dos*, that is, where there is no marriage there is no dower. But a divorce *à mensa et thoro*, or from bed and board only, doth not destroy the dower ; not even if it is for adultery itself, by the common law <sup>r</sup>. But by the statute 13 Edw. I. c. 34. if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. And the widows of traitors, or persons attainted of treason, are barred of their dower (except in the case of certain modern treasons relating to the coin <sup>s</sup>) ; but not the widows of felons<sup>t</sup>. An alien (one born out of the King's allegiance) cannot be endowed, unless she be queen consort ; for no alien is capable of holding lands. And that the wife may be endowed, she must be above nine years old at her husband's death, otherwise she shall not be endowed<sup>u</sup>.

THE wife being entitled by law to be endowed of one-third part of all such lands and tenements of which her husband was seised in fee-simple or fee-tail, at any time during the coverture or marriage, shall hold such one-third part during the term of her natural life ; and that whether she hath issue by her husband or not<sup>w</sup>, provided any issue which she might have had, might by possibility have been heir. Therefore, if a man seised in fee-simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands ; for her issue might by possibility have been heir on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife : though Jane may be endowed of those lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed ; for no issue that she could have, could by any possibility inherit them<sup>x</sup>. A seisin in law (that is, a right to possess) of the husband, will be as effectual as a seisin in deed, which is an actual possession<sup>y</sup>, in order to render the wife dowable ; for it is not in the wife's power to bring the husband's title to an actual seisin<sup>z</sup>. Yet the seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again

<sup>r</sup> Co. Litt. 32.

<sup>s</sup> Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.

<sup>t</sup> Black. Com. 2 V. 131.

<sup>u</sup> Co. Litt. 31.

<sup>w</sup> *Ibid.*

<sup>x</sup> Black. Com. 2 V. 131.

<sup>y</sup> *Ibid.* 127.

<sup>z</sup> Co. Litt. 31.

(as where by a fine land is granted to a man, and he immediately renders it back by the same fine), such a feisin will not entitle the wife to dower<sup>a</sup>: for the land was merely *in transitu*, and never rested in the husband. But if the land abides in him for a single moment, it seems that the wife shall be endowed thereof. This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate by survivorship, in consequence of which seisin his widow had a verdict for her dower<sup>b</sup>. A widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned, unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle built for defence of the realm, because it ought not to be divided. But of a castle that is only for the private use and habitation of the owner, a woman shall be endowed<sup>c</sup>. So a woman shall not be endowed of a common without stint; for as the heir would then have one portion of this common, and the widow the other, and both without stint, the common would be doubly stocked. But a woman shall be endowed of a common certain; and so of other incorporeal hereditaments; as rent, rent-service, rent-charge, and rent-seck<sup>d</sup>, mentioned in this and a former chapter<sup>e</sup>.—Though curtesy out of a trust is allowed, as was mentioned in the former part of the foregoing section; yet dower has been refused thereout; a partiality not easy to be reconciled with reason, however settled by the current of authorities<sup>f</sup>.—Where dower is allowable, it matters not though the husband alien or sell the lands during the coverture; for he aliens them liable to dower<sup>g</sup>, of which the wife cannot be barred but by a fine, or like matter of record, to which she must be privy, and privately examined: wherefore, and for saving the expense of a fine, it is common where the estate is but of small value, for the husband, when he conveys it, to bind himself by a bond, to save harmless and keep indemnified the purchaser, against any claim that might afterwards be made for or in respect of dower. Yet as there is no method of effectually barring the wife but by a fine, or like matter of record, the bond can be but of little use if the obligor should die insolvent; so that it behoves the purchaser, in case he takes

<sup>a</sup> Co. Litt. 31.<sup>b</sup> Black. Com. 2 V. 132.<sup>c</sup> Co. Litt. 31.<sup>d</sup> *Ibid.* 32.<sup>e</sup> Pag. 24. 86.<sup>f</sup> Co. Litt. 29. Note 6, 13 Edit.<sup>g</sup> *Ibid.* 32.

a bond instead of having a fine passed, to look well to the probability of the obligor's dying solvent, and leaving a sufficiency to discharge the bond, in case dower should be demanded.

BUT it now seldom happens that the wife has any claim to dower; for not only upon most preconcerted marriages, where a settlement is made pursuant to the statute of 27 Hen. VIII. c. 10. and thereby she is barred by a jointure made to her in lieu thereof, but when a man purchases an estate in fee-simple, it is usual for him, in order to prevent his wife having any claim of dower therefrom, and to save the expence of a fine in case he should sell it, to take the conveyance in his own name and the name of another person as trustee; as for example, suppose A. B. to be the grantor, C. D. the grantee who purchases this estate, and E. F. a friend of C. D. the grantee. Now, in consideration of the sum agreed for by C. D. to be given to A. B. for this estate, and in consideration of 5s. a-piece paid by the said C. D. and E. F. the said A. B. sells and aliens this estate to C. D. and E. F. TO HOLD, unto the said C. D. and E. F. and their heirs, to the use of the said C. D. and E. F. and the heirs of the said E. F. In trust nevertheless, as to the estate and interest of the said E. F. and his heirs, to the only proper use and behoof of the said C. D. his heirs and assigns for ever, and to and for no other use, trust, intent, or purpose whatsoever. So by this means the wife of C. D. will have no claim or title to dower from the estate; and C. D. may sell and safely convey the same to a purchaser without passing a fine to bar his wife of dower. So if a husband before marriage conveys his estate to trustees and their heirs, whereby he puts the legal estate out of him, the wife after his death shall not be endowed.

HERE we may observe what has been mentioned concerning the descent of estates held in fee-simple, and how the law disposes thereof, and of those held in fee-tail, that this is consistent with the general law of the land. But particular counties, cities, towns, manors, and lordships, being indulged with the privilege of abiding by their own customs; which privilege is confirmed to them by several acts of parliament; those customs prevail in contradistinction to the rest of the nation at large<sup>b</sup>. Of those customs is the customs of gavel kind, chiefly subsist-

<sup>b</sup> Black. Com. 1 V. 74.

ing in Kent, though it is to be found in other parts of the kingdom<sup>i</sup>. By this custom, not only the eldest son of the father shall succeed to his inheritance, but all the sons alike<sup>k</sup>. And though the ancestor may be attainted and hanged, yet the heir shall succeed to his estate without any escheat to the lord<sup>l</sup>. And by this custom the husband shall be tenant by the curtesy without having any issue<sup>m</sup>; yet curtesy by the custom of gavel kind, is subject to several disadvantages; for it is only a moiety of the wife's land, and it ceaseth if the husband marries again<sup>n</sup>.—By the statute 31 Hen. VIII. c. 3. a great part of Kent is made descendable to the eldest son, according to the course of the common law; as by means of that custom divers ancient and great families, after a few descents, came to very little or nothing<sup>o</sup>. And there are six other statutes for disgavelling particular lands in Kent, besides the 31 Hen. VIII. though that is the only statute in print. Those are mentioned in Mr. Robinson's book on gavel kind<sup>p</sup>.—Another of those customs is the custom that prevails in divers ancient boroughs, and therefore called borough-english, whereby the youngest son shall inherit the estate in preference to his elder brothers<sup>q</sup>. And there is a custom in other boroughs that a widow shall be entitled for her dower to all her husband's lands; whereas by the common law she shall be endowed of one-third part only<sup>r</sup>. Likewise there are special and particular customs of manors, of which every one has more or less, and which bind all the copy-hold and customary tenants that hold of the said manors<sup>s</sup>. Some copy-holders are for lives, one, two, or three successively; and some inheritances from heir to heir by custom; and custom ruleth those estates wholly, both for widow's estates, fines, heriots, forfeitures, and all other things<sup>t</sup>.—The customs that prevail in the city of London and province of York, which comprehend so considerable a part of the kingdom, will be the subject of the ensuing chapter.

<sup>i</sup> Black. Com. 1 V. 74.

<sup>k</sup> Co. Litt. 175.

<sup>l</sup> Black. Com. 1 V. 74. 2 V. 84.

<sup>m</sup> Co. Litt. 30.

<sup>n</sup> *Ibid.* Note 1 13 Edit. Refers to Robins. Gavelk. b. 2. c. 1. and says, "There the learned author suggests, that some have doubted, whether there is any such variance between

"the common law and the custom, and therefore undertakes to prove it by authorities on record."

<sup>o</sup> Co. Litt. 140.

<sup>p</sup> Robins. on Gavelk. 75.

<sup>q</sup> Black. Com. 1 V. 75.

<sup>r</sup> *Ibid.*

<sup>s</sup> *Ibid.*

<sup>t</sup> Bacon's Law Tracts, 137.

## CHAP. V.

### *The Customs of the City of London and Province of York.*

#### SECTION THE FIRST.

WHEREIN THE CUSTOMS OF LONDON AND YORK AGREE, AND WHEREIN THEY VARY.

**W**HAT those customs are within the city of London and province of York, which comprehend so large and considerable a part of the kingdom, it is somewhat strange, says Dr. Burn, that so few authors have taken any pains to inform their readers or themselves; and that those customs are so ancient, and of ancient times were of such general and almost universal extent, that some of the greatest lawyers have doubted whether they were not part of the common law<sup>a</sup>. Formerly, not only in the province of York and city of London, but in most, if not in all parts of England, a man was restrained from bequeathing the whole of his personal estate away from his wife and children; but the law in that particular is now altered, though it continued in the province of York, the principality of Wales, and in the city of London, later than in other parts of the kingdom, and till very modern times; when in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes were provided, the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5.<sup>b</sup> for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third 11 Geo. I. c. 18. for London: whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widows children

<sup>a</sup> Eccles. Law, 4 V. 368.

<sup>b</sup> This statute of 2 & 3 Ann. recites that a proviso was contained in the statute 4 W. & M. that nothing therein contained should extend to the citizens of the city of York; and that the mayor and commonalty, on behalf of the inhabitants of the said city, had requested that the said proviso might be repealed. And by the statute 2 & 3 Ann. it is enacted that the said proviso, as far as the same concerned the citizens of the city of

York, shall be repealed; so that it shall be lawful for all and every the citizens of the city of York, who shall be free-men of the said city, inhabiting therein, or within the suburbs thereof, by their last wills and testaments, to dispose of their goods, chattels, and other personal estate, to such persons as they shall think fit, as any other persons inhabiting within the province of York, may lawfully do by virtue of the statute 4 W. & M.

and other relations to the contrary are totally barred. So that now, throughout all the kingdom of England, a man may devise the whole of his chattels as freely as he formerly could any part thereof<sup>c</sup>. But in case of intestacy, the statute of distribution expressly excepts and reserves the customs of the city of London and province of York. So that although the restraint of devising is removed by the statutes just mentioned, yet the ancient customs of London and York remain in full force with respect to the estates of intestates<sup>d</sup>. And by the custom of the city of London, there is still a difference to what it is in most other parts of the kingdom in respect to the disposing the care of children<sup>e</sup>; as by statute 12 Car. II. c. 24. any father under age, or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant<sup>f</sup>, either in possession or reversion, till such child attains the age of twenty-one years. But if the father is a freeman of London, he cannot devise the disposition of the body of his child; and if he doth, yet the infant shall remain in the custody of the mayor and aldermen<sup>g</sup>, who are guardians to the children of all freemen of London that are under the age of twenty-one at the time of their fathers decease<sup>h</sup>. So that if a freeman or free-woman die, leaving orphans within age unmarried, the court of orphans, which is held by custom time out of memory, before the lord mayor and aldermen of the city of London, shall have the custody of their body and goods; and the executors or administrators shall exhibit inventories before them, and become bound to the chamberlain to the use of the orphans, to make a true account upon oath; and if they refuse, they may be committed till they become bound<sup>i</sup>: And their being bound in the spiritual court doth not excuse them from this custom<sup>k</sup>, as they may still be compelled to give other security to the chamber of London<sup>l</sup>. And if any person in-

<sup>c</sup> Black. Com. 2 V. 493. By the statute 11 Geo. I. it shall be lawful for all persons who, after the 1st of June 1725, shall become free of the city of London, and for all who at that time shall be unmarried, and not have issue by any former marriage, to dispose of their personal estate. But if any person who shall be free of the city, hath agreed or shall agree by writing, in consideration of marriage or otherwise, that his personal estate shall be distributed according to the custom of the city; or in case any person so free shall die intestate, his personal estate shall be subject to the custom.

<sup>d</sup> Black. Com. 2 V. 518.

<sup>e</sup> Co. Litt. 88.

<sup>f</sup> Popish recusants, are those convicted in a court of law of not attending the service of the church of England, and are thereby subject to divers penalties; or those refusing to make the declaration against popery, as enjoined by the statute 30 Car. II. c. 2. when tendered by the proper magistrate, by which they are also subject to divers disabilities. Black. Com. 4 V. 56.

<sup>g</sup> Priv. Lond. 287.

<sup>h</sup> *Ibid.* 288.

<sup>i</sup> *Ibid.* 280. 287.

<sup>k</sup> Law of Exec. 252.

<sup>l</sup> 1 Roll's Abr. 550.

termarry with an orphan, without the consent of the court, such person may be fined by them, according to the quality and portion of the orphan; and unless such person pay the fine, or give security to pay it, they may commit him to Newgate, to remain there till he submit to their orders<sup>m</sup>. A peer has no privilege for taking and marrying an orphan of London without licence<sup>n</sup>—He that marries an orphan without consent of the court, must make a jointure before he receives the portion<sup>o</sup>.—Upon the marriage of orphans, the custom is to appoint the common serjeant to treat and take security for the orphan<sup>p</sup>.

As to intestacy, in the main the customs of London and York agree; but there are some variations, and in two principal points they considerably differ. The one is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament<sup>q</sup>; and if they die under that age, whether sole or married, their share shall survive to the other children<sup>r</sup>. The other is, that in the province of York, the heir at common law, who inherits any land, either in fee-simple or fee-tail, is excluded from any filial portion or reasonable part<sup>s</sup>—As those variations will appear more conspicuous hereafter, we shall now proceed to take a view of those customs under two distinct heads.

## SECTION THE SECOND.

### THE CUSTOMS OF THE CITY OF LONDON AS TO INTESTACY.

**I**F a freeman of London dies in London, or elsewhere, *intestate*, and though his estate doth not lie in the city, but elsewhere, his children are entitled to their share of his personal estate by the custom<sup>t</sup>. And if the freeman dies, leaving a widow and a child or children, his personal estate (after his debts are paid, and the customary allowance for his funeral, and for the widow's chamber<sup>u</sup>, are deducted thereout) is, by the custom of the city, to be divided into

<sup>m</sup> Priv. Lond. 282, 283.

<sup>n</sup> Lev. 163.

<sup>o</sup> Priv. Lond. 286.

<sup>p</sup> Laws of Lond. 67.

<sup>q</sup> 2 Vern. 558.

<sup>r</sup> Prec. Cha. 537.

<sup>s</sup> Swinb. 231.

<sup>t</sup> Priv. Lond. 288.

<sup>u</sup> The widow's apparel, and furni-

ture of her bedchamber, in London, is called the widow's chamber. Black. Com. 2 V. 518. In a case before lord Parker, it was said that the widow is entitled to the furniture of her chamber; or, in case the estate exceeds two thousand pounds, then to fifty pounds instead thereof. Case of Bridle and Bridle, 7 Vin. Abr. 200.

three equal parts, and disposed of in the following manner : to wit, one-third part thereof to the widow, another third part to the children, and the other third part (being taken out of the custom) is now, by the statute 1 Jac. II. c. 17. made subject to the statute of distribution; and so dividing the whole into nine parts, four ninths belong to the wife, and five ninths to the children<sup>w</sup>. And if a man dies worth 1800*l.* leaving a widow and two children, the estate shall be divided into eighteen parts, whereof the widow shall have eight, six by the custom, and two by the statute, and each of the children five, three by the custom, and two by the statute: if he leaves a widow and one child, she shall still have eight parts as before, and the child shall have ten, six by the custom, and four by the statute<sup>x</sup>. And if there should be an after-born child, such child will come in with the rest for a customary share of the father's personal estate<sup>y</sup>. If the freeman leaves a widow, and no child, the widow shall have three-fourths of the whole; two by the custom, and one by the statute, and the remaining fourth shall go by the statute to the next of kin<sup>z</sup>. If he hath no wife, but hath children, the half of his personal estate belongs to his children, and the other half (being, as it is called, the dead man's part; because formerly the ordinary, or he to whom the ordinary committed administration, was to dispose of the same to pious uses for the benefit of the deceased's soul) is now distributable amongst the children by the statute<sup>a</sup>. And if he hath neither wife nor child at the time of his death; then the whole belongs to the deceased, and is distributable by the statute<sup>b</sup>. As to the freeman's grandchildren, the custom does not extend to these, as hath been determined in several cases<sup>c</sup>.

WE may now observe what situation the widow must be in at the time of her husband's death, that she may be entitled to his personal estate; as, whether there is any settlement whereby she may be barred of her customary part, or the part she may be entitled to under the statute of distributions; and also the situation the children must be in that they may be entitled; as, whether any of them have been advanced, so as thereby to be barred in part or in whole of what they would otherwise be entitled to: which, after being considered, more will be said concerning the distribution.

<sup>w</sup> 2 Salk. 426. L. Raym. 1328.

<sup>x</sup> Vern. 180.

<sup>y</sup> Black. Com. 2 V. 518.

<sup>z</sup> Prec. Cha. 499.

<sup>a</sup> Black. Com. 2 V. 519.

<sup>a</sup> 1 P. Will. 341.

<sup>b</sup> Law of Test. 196.

<sup>c</sup> 1 Vern. 397. 1 P. Will. 341.

<sup>2</sup> Salk. 426.



IF the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity with regard to the custom only; but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement<sup>d</sup>; and if a freeman of London makes a jointure on his intended wife, and the same is expressed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this shall not bar her of her customary share of his personal estate<sup>e</sup>: yet it is otherwise, if it is said to be in bar of her customary part<sup>f</sup>. In respect to the part she will be entitled to under the statute of distributions; where a freeman whose wife has been compounded with dies intestate, his widow shall have such part as she is entitled to under the statute of distributions, if there are no express words in the agreement to exclude her<sup>g</sup>: but where a widower and widow being about to intermarry, and having only personal estate; by articles made before marriage, agreed, that in case the husband survived, he should have two thousand pounds only of his wife's personal estate, and the rest to be at her disposal, &c. and in case the wife survived, then she was to have two thousand pounds out of the husband's personal estate, without saying *only or no more*. The husband, being a freeman of London, died; and his wife brought her bill for an account of his personal estate over and above the two thousand pounds, and so to be let into the customary share thereof; but it was decreed, that the equitable construction of those articles must be to exclude the wife from any further share out of the estate; and, though the words were not so full to exclude her, yet the intent of the articles appearing to be a mutual reciprocal agreement between them for settling each other's claim, ought not to be extended larger on one side than the other, and decreed that the wife must have only the two thousand pounds<sup>h</sup>. — Where a freeman of London, who was a widower, and had several children, being possessed of a considerable leasehold estate, on a second marriage conveys these leases in consideration of 2000*l.* portion in trust for himself for life, remainder to his wife for life, *in lieu and bar of all dower, customary estate, &c.* remainder to the first son of that marriage, and so to every other son; and in the settlement there was an

<sup>d</sup> Black. Com. 2 V. 519.

<sup>e</sup> Eq. Caf. Abr. 138, 159.

<sup>f</sup> 1 P. Will. 530.

<sup>g</sup> Prec. Cha. 327.

<sup>h</sup> Laws of Lond. 102.

agreement that the trustees should sell those leases, and invest the money in the purchase of lands of inheritance to be settled to the uses aforesaid; but the husband died before any purchase made, and it was held that the wife was barred from claiming any other part of the personal estate<sup>1</sup>. And where a settlement was made on the wife of a citizen, of part of the personal estate of the husband, in bar and satisfaction of all her claim and demand out of his personal estate, *by the custom or otherwise*, and the husband died intestate; it was decreed that the wife was barred of her distributive share of his estate by the statute of distributions<sup>2</sup>.

HENCE we may perceive, that if there are sufficient words in a settlement made previous to marriage, the freeman's wife will be barred of the claim she might otherwise have to her husband's personal estate, either by the custom or by the statute of distributions; in consequence of which it will be as if there were no wife, and the children will have one half by the custom, and the other half by the statute<sup>1</sup>. And if the wife be divorced for adultery, she shall not have her customary share<sup>m</sup>.

If any of the children are advanced by the father in his life-time with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom: but if they are fully advanced, the custom entitles them to no further dividend<sup>n</sup>.—The advancement must be of money or personal estate; for the custom extends only to the personal estate of a freeman; because when it first began, the citizens of London had no regard at all to a real estate, as they did not suppose any freeman of London would purchase such estate, but would employ his whole fortune and stock in trade for the benefit of commerce<sup>o</sup>. So a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot<sup>p</sup>; and if a citizen conveys to a child land of inheritance, though it be expressed for advancement, it bars no child's part; but such may come in for a share of the personal

<sup>1</sup> Eq. Caf. Abr. 453.

<sup>2</sup> Case of Badcock and Stanhope, 7 Vin. Abr. 211.

<sup>1</sup> 1 P. Will. 644. 2 P. Will. 527.

<sup>m</sup> Bunb. 16.

<sup>n</sup> Black. Com. 2 V. 519.

<sup>o</sup> Abr. Eq. Caf. 150.

<sup>p</sup> 1 Chs. Caf. 160.

estate with the rest<sup>q</sup>. And it has been certified, that where an heir or co-heir had a real estate settled on him or her, the same was out of the custom of the city of London; and though the father should afterwards declare it to be a full advancement for such child, yet that was no bar to his orphanage part; neither was it to be brought into hotchpot, but was clearly out of the custom<sup>r</sup>. And where money was given by the father to be laid out in land to be settled on the son and the intended wife for their lives, with remainders in tail; and the question was, whether this should be reckoned to be an advancement by part of the personal estate of the father, so as the son ought to bring the same into hotchpot, to entitle him to a share of the personal estate? it was held by the lord chancellor, that this money was not to be reckoned as part of the personal estate<sup>s</sup>.

How this advancement is to be bestowed, and what shall be deemed an advancement either in part, so that the child must bring the same into hotchpot before he be entitled to any benefit under the custom; or in whole, so as thereby the child will be excluded from having any further portion, seems to have been much questioned. Though it is said, generally, by a late author, that any provision made by the father in his life-time for his children, is advancement within the custom; but that a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot<sup>t</sup>. Yet small inconsiderable sums occasionally given to a child cannot be deemed an advancement, or part thereof; neither is maintenance money, or an allowance made by a freeman to his son at the university, or in travelling, &c. to be taken as any part of his advancement; this being only his education, and it would create charge and uncertainty to enquire minutely into such matters. So putting out a child apprentice is no part of his advancement, for it is only procuring the master to keep him for seven years instead of the parent<sup>u</sup>.

It is questioned by Mr. Vernon, whether only the provision made on the marriage of a child, or in pursuance of a marriage agreement, is an advancement<sup>w</sup>; and where 400l. were given to a daughter long after her marriage, and with-

<sup>q</sup> 2 Cha. Caf. 160.

<sup>r</sup> 1 Vern. 216.

<sup>s</sup> Case of Annand and Honeywood,

3 Vern. 345.

<sup>t</sup> Law of Test. 205.

<sup>u</sup> Laws of Lond. 82.

<sup>w</sup> 1 Vern. 89.

out any agreement that the same should be for her marriage-portion; the lord chancellor was of opinion, that it could not be any advancement, unless it had been given her as a marriage portion, or in pursuance of a marriage agreement <sup>x</sup>. — Upon a reference to the recorder of London, by the lord chancellor, to certify what is the custom of London concerning the advancement of children by their father; it was certified, that by the laws and customs of the city, if any freeman's child be married in the lifetime of his or her father, by his consent, and not fully advanced to his full part or portion of his father's personal or customary estate, as he shall be worth at the time of his decease; such freeman's child, so married, shall be excluded and debarred from having any further part or portion of his or her father's personal or customary estate, to be had at the time of his decease; except such father, by some writing by him written and signed with his name or mark, shall declare and express the value of such advancement: and then every such child, after the decease of his father, producing such writing, and bringing such portion so had of his father into hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate which his father had at the time of his decease; notwithstanding such father shall, by any writing under his hand and seal, declare such child was by him fully advanced <sup>y</sup>. — It is said to be sufficient, if the freeman declare the advancement by any writing under his hand, or by any thing written by him, although it be in an almanack, or elsewhere <sup>z</sup>. But in the case of *Dean and lord Delaware*, the father's declaring, that the child was fully advanced or not advanced, was of no avail, unless it appeared what the advancement was in certainty; to the intent that it might be known, whether such advancement did amount unto as much as would have belonged to the child by the custom <sup>a</sup>. And in a case where a freeman had advanced his child on marriage, and the certainty of that advancement did not appear under the freeman's hand; it was adjudged a full advancement, and that the freeman's declaration alone that he had advanced his child, was not of itself sufficient <sup>b</sup>.

<sup>x</sup> 1 Vern. 61.<sup>y</sup> L. Raym 484. Eq. Caf. Abr. 155.<sup>z</sup> Green's Privil. Lond. 53.<sup>a</sup> H. 1703. 2 Vern. 630.<sup>b</sup> Case of Claver and Spurling. T. 1729. 2 P. Will. 527.

THE child of a freeman of London, when of age, may, in consideration of a present fortune, bar herself of her customary part; as where the father, on his daughter's marriage, agreed to give her 3000*l*; which she, being of age, covenanted to receive in full of her customary share as a freeman's daughter: and though it was objected, that such a future right cannot be released, and that parents might make an ill use of the power they have over their children in forcing them to give such discharges; yet this was held a good bar of the custom, there being no fraud in the transaction<sup>c</sup>. But such release, without a valuable consideration, is not good; for in such case, at the time of the release, the children having neither *jus in re* nor *jus ad rem*, that is, neither right in the thing nor right to the thing, the whole being in the father during his life, there is nothing for any release to operate upon<sup>d</sup>. — If a man who is of age marries a freeman's daughter who is under age, he may bar himself of any future right that he might have to the freeman's customary estate by virtue of such marriage; as where a freeman of London had two daughters and one son; one of the daughters married, and on receiving a suitable portion, the husband released all right and interest which he had or might have to any part of the father's personal estate by the custom or otherwise; and covenanted, that at any time after the death of the father, he would do any further act for the releasing of any right which he might have by the custom. Jekyll and Gilbert, commissioners, inclined to think, that the release being for a valuable consideration, purporting an agreement to quit the right to the orphanage part, to be binding in equity; but though this might not be so clear, yet the covenant for a valuable consideration to release the future right is good; and so they decreed on the execution of the release<sup>e</sup>. Where the husband and wife, in consideration of 2000*l*. the wife's marriage portion, covenanted to release all the right and interest that might accrue to them out of the father's personal estate by the custom of the city of London, and a bill was brought to have a specific performance of the articles made on the marriage: The defence made for the defendant was, that the customary part being a mere possibility and contingency, which might or might not happen, it could

<sup>c</sup> 2 Eq. Cas. Abr. 272. Str. 947.

<sup>e</sup> 2 P. Will. 272.

<sup>d</sup> 1 Atk. 402.

not be released; and if it could, that at the time of the articles the wife was an infant, and so not bound by them; besides, that the 2000*l.* was no consideration for releasing such an interest, the wife's father having died worth upwards of 20,000*l.* By lord chancellor Hardwicke: These considerations are too loose either for a judge at law, or in this court, to lay any weight upon; and I must determine according to the facts, by the rules of law, and of this court. In this case there appears to have been a valuable consideration for the agreement in the articles, because at the time when the 2000*l.* were given, the defendant's wife was entitled to no part of the estate of her father; and it was given for her advancement in the world; and it is highly reasonable that such kind of articles should be carried into execution, and that when a father is bountiful to his children in his life-time, he should have his affairs settled to his own satisfaction. As to the objection of the customary part being a possibility, and merely in contingency, it is of no weight; for there is no doubt but it might be released in equity: but here is a covenant, which the defendant is bound by in all events. And it is no objection to say, that the wife was under age; for though in this respect, if the husband were dead, the articles would not bind her, and she would by survivorship be entitled to the customary share, as a chose in action not recovered or received by the husband; yet he being alive, it is a matter that accrues to him in right of his wife; and he may release it, and his release will bind her; and therefore it was reasonable he should perform his covenant. I found my opinion too on an old law well known in the city, by the name of Jud's law; whereby a husband was authorized to agree with the father for the wife, though she was under age<sup>f</sup>.

As to children partly advanced, bringing their advancement into hotchpot; it may be observed, as has been mentioned, that it is to be brought in among the brothers and sisters only, but not with the widow<sup>g</sup>: for it has been determined to be beyond all doubt, that where a child that had a portion, but was not fully advanced, but was to bring her portion into hotchpot, that the portion should not be

<sup>f</sup> Case of Medcalfe and Ives. 1 Atk. 63.    <sup>g</sup> Pag. 106.

brought into the personal estate in general, so that the widow might come in for part of it, but that it should be brought into the orphanage part only<sup>h</sup>. And where a freeman of London hath but one child, and he hath received some portion from his father, and the father dies leaving this child and a wife; the child shall have his full orphanage part, without any regard to what he hath already received<sup>i</sup>. And where an only child is in part advanced by the father in his life-time, such child shall not bring his portion into hotchpot, there being none in equal degree with him<sup>k</sup>. The only meaning of bringing the child's share into hotchpot is, to make an equality among the children, and not for the benefit of the mother<sup>l</sup>.

If a freeman having several children, or but one child, doth *fully advance* all his children, or his single child; this satisfies the custom, and is the same as if he had no child, and his personal estate shall go as if there was none<sup>m</sup>, and the wife shall have a moiety<sup>n</sup>, or one half; which must be understood to be a moiety or one half by the custom, from which the children, or one child, being full advanced, are excluded. So consequently, it seems, that the other moiety or one half, must fall under the direction of the statute of distributions, and be distributed as the statute directs.

THE custom, it may be observed, extends only to the wife and children; whereas, if there is neither wife nor child living at the intestate's death, the whole of his personal estate is subject to the statute of distribution, as has been mentioned<sup>o</sup>, and consequently must be distributed in the same manner as was shewn in a former chapter<sup>p</sup>.

BESIDES what has been mentioned, concerning how distribution is to be made where the freeman leaves a wife, child, or children; and as we have now seen that the wife may be barred by settlement, and the children by being advanced; we may here observe, that the course of distri-

<sup>h</sup> 1 Vern. 345.

<sup>i</sup> 2 Salk. 420.

<sup>k</sup> 2 Vern. 234.

<sup>l</sup> 2 P. Will. 526.

<sup>m</sup> *Ibid.* 527.

<sup>n</sup> 2 Vern. 665.

<sup>o</sup> Pag. 104.

<sup>p</sup> Chap. 3.

bution of the personal estate of a freeman of London seems to be thus :

IF the freeman dies intestate, leaving no wife, but an only child ; which child is advanced, or partly advanced, or not advanced ; in all these cases it makes no difference, for one way or other such child shall have the whole clear personal estate. For supposing such child is advanced, he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is partly advanced, he shall have one half by the custom ; there being no other child with whom to bring his partial advancement into hotchpot, and the other half by the statute. So in like manner, if he is not at all advanced ; he shall have one half by the custom, and the other half by the statute.

IF the freeman leaves no wife but divers children ; as suppose them to be three, the first of which is advanced, the second partly advanced, and the third not advanced : in this case the child partly advanced, and the child not advanced, shall have one half equally betwixt them by the custom ; the child partly advanced first thereunto bringing his partial advancement into hotchpot ; and the other half (which is called the dead man's part) shall be distributed by the statute equally between those two children, the first child being supposed to be fully advanced already.

As to the representatives of children dead ; those we must observe, are admitted by the statute to a distributive share of the dead man's part, in the place of the deceased child or children whom they represent ; but not so of the customary part by the custom.

IF the freeman leaves a wife, and no child ; she shall have, besides her chamber, one half by the custom, and the other half (being the dead man's part), shall be distributed by the statute ; of which dead man's part by the said statute she shall have one half : so that, dividing the whole personal estate into four parts, she shall have three, and the next of kindred one. But although there



there be no child of the freeman's living at his death ; yet if there hath been a child, and there are any legal representatives of such child, that is, lineal descendants ; then of the dead man's part, by the statute, the wife shall have but one-third, and the representatives shall have the other two-thirds ; so that, dividing the whole personal estate into six parts, she shall have four, and the representatives two.

IF the freeman leaves a wife, and also a child or children, any one or more of which children are not advanced ; by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute ; of which dead man's part by the said statute she shall have one-third, and the other two-thirds shall be distributed amongst the children : so that, dividing the whole into nine, she shall have four, and they shall have five. But if the wife be barred by settlement, whereby it may be as if there were no wife ; then the children will have one half by the custom, and the other half by the statute, as hath been mentioned <sup>1</sup>.

THE orphanage share not being fully vested in the children till they attain the age of twenty-one, a child intitled to an orphanage share of his father's personal estate dying under twenty-one, cannot devise it by his will ; for by the custom it survives to the other children, as hath been mentioned <sup>1</sup>. But a child may devise the share which he hath by the statute of distributions <sup>2</sup> ; and that at the age of fourteen, if a male, and twelve, if a female ; provided he or she be of sufficient discretion ; as it seems expressly laid down by Sir William Blackstone <sup>3</sup> ; and his reason given for it is, because that is the rule of the civil law, and that as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law ; so that, as the learned author says, no objection can be admitted to the will of an infant of fourteen merely for want of age ; but if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament.

<sup>1</sup> Page 106.

<sup>2</sup> Page 103.

<sup>2</sup> Vern. 559.

<sup>3</sup> Com. 2 V. 497.

## SECTION THE THIRD.

THE CUSTOM OF THE PROVINCE OF YORK  
AS TO INTESTACY.

**W**E have already seen, that here, as well as in the city of London, a man may by will dispose of the whole of his personal estate to whom he thinks fit, and that the claims of the widows, children, and other relations to the contrary, are totally barred<sup>u</sup>. But as to intestacy; if a man being an inhabitant or an householder within the province of York, and dying there or elsewhere intestate, and at the time of his death hath a wife, and also a child or children; his goods (after paying his debts, and deducting the widow's apparel and furniture of her bed-chamber<sup>w</sup>) shall be divided into three parts; whereof the wife ought to have one part, the child or children another part, and the third part (which is called the death's or dead man's part) is distributable by the statute; of which dead man's part, by the statute, the wife shall have one-third, and the other two-thirds shall be distributed amongst the children: so that, dividing the whole into nine parts, the wife shall have four and the children five; in like manner as has been mentioned concerning the custom of the city of London<sup>x</sup>. But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband by virtue of the custom, in such case it is as if there were no wife with respect to the customary part; so, if it is in bar of all her demands, by virtue of the said custom, *or otherwise*, she shall be debarred also of any distributive share by the statute<sup>y</sup>. And as to the children; if the intestate hath a wife, and a child or children, which child is heir to the intestate, or which children were advanced by the father in his lifetime; in this case it is as if he had no child; and therefore his goods shall be divided into two parts;

<sup>u</sup> Pag. 101.

<sup>w</sup> By the general and ancient custom of the province of York, widows have been tolerated to reserve to their own use, not only their apparel and a convenient bed, but a coffer with divers things therein necessary for their own persons; which things have been usu-

ally omitted out of the inventory of their deceased husband's goods, unless the husband was so far indebted, as the rest of his goods would not suffice to discharge the same. Swinb. 422.

<sup>x</sup> Pag. 104.

<sup>y</sup> 1 Vern. 15.

whereof the wife is to have one part to herself, and the other half is distributable by the statute<sup>z</sup>, as we shall see more of hereafter.—If the intestate hath neither wife nor child at the time of his death, his whole personal estate (the funeral expences, and other necessary charges being first deducted) shall be disposed of in due course of administration, as now falling under the direction of the statute of distribution<sup>a</sup>; and consequently must be distributed in such manner as was shewn in a former chapter<sup>b</sup>.

As to the child's being excluded as being heir; this, we may observe, is one of the main points wherein the custom of the city of London and province of York differ; as in the former, whatever real estate the child has, either by descent from his father, or conveyed to him by his father in his lifetime, it will in no wise bar the child from receiving his share of his father's personal estate; whereas here he will be totally barred from receiving any part thereof by the custom, if he should have any real estate by descent, or otherwise, from his father. For here not only the heir of lands holden in fee-simple is thereby barred from the recovery of a filial portion, but he also that is heir in fee-tail, either general or special<sup>c</sup>; and although the lands be of very small revenue, perhaps not more than a noble yearly rent, and the goods very great in comparison of so small a rent (as may be 1000l. or more); even in this case the heir is barred from the hope of a filial portion<sup>d</sup>: and not only that heir is excluded from a filial portion who doth enter upon the land immediately after his father's death, but he also who is heir in reversion, is heir; and being heir, can have no filial portion: so by this it may fall out very hard with the heir in reversion; for if he should

<sup>z</sup> Swinb. 220.

<sup>a</sup> *Ibid.*

<sup>b</sup> Chap. 3.

<sup>c</sup> Estates tail may be either general:—or general to male or to female;—or special;—or special to male or to female. Tail general is, where lands and tenements are given to one, and the heirs of his body begotten. By which manner of bequeathing, how often soever the donee in tail marries, his issue by every such marriage is in successive order capable of inheriting the estate tail *per formam doni*, that is, by the form of the gift. If lands are given to a man, and the heirs male of his body begotten, it

creates an estate in tail male general: and *vice versa*, an estate tail female general. Tenant in tail special is, where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. As where lands and tenements are given to a man and the heirs of his body, *on Mary his now wife to be begotten*; hereby no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. Black. b. 2. c. 7.

<sup>d</sup> Swinb. 231, 232.

die in the mean time, before he could lawfully enter to those lands which be his only in reversion, he could reap no benefit either of his father's lands or goods; yet he must be content with his lot, and though not he, but his shall enjoy the land at the time appointed<sup>c</sup>. And although the heir receive the land by settlement made upon his father's marriage; yet he is heir so as to be excluded thereby from a filial portion; as where the father having by settlement on his marriage settled his real estate to himself for life, part to his wife for her jointure, and the remainder of the whole to his first and other sons in tail, remainder to his own right heirs; the eldest son was thereby excluded *by the custom of the province of York* from having any share of his father's personal estate<sup>f</sup>. And if the heir hold lands by deed of feoffment<sup>g</sup> in mortgage, or with clause of redemption; that is to say, upon condition that if the feoffor pay unto him a sum of money at a certain day, that then the feoffor may re-enter, and the deed or grant be void; yet in the mean time, until the condition be performed and the land redeemed, if he should demand any filial portion he is barred; because as yet he is heir to the deceased. But if the lands should be redeemed, and the money satisfied, then it is thought that he may recover a filial portion; because then he is not heir to the deceased, nor the advancement certain which was made by the father in his lifetime<sup>h</sup>.

HAVING thus seen how the heir may be barred from receiving a filial portion by having lands from his father by descent or otherwise; we come now to consider what advancement will bar a child from receiving a filial portion. But before we proceed with this, we may here just take notice, that what has been said concerning the heir being barred, relates solely to his being barred of what he would be entitled to by the custom, and not what he will be entitled to by the statute; which we shall perceive by what will be said hereafter.

<sup>c</sup> Swinb. 231.

<sup>f</sup> Case of Constable and Constable, 2 Vern. 375.

<sup>g</sup> A feoffment, or deed of feoffment, is the ancient method of conveyance. Black. Com. 2 V. 310. Yet since the Statute of 27 Hen. VIII. c. 10. of uses, the conveyance by lease and release has taken place of it, and is become a very

common assurance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, and supplying the place of livery and seisin required by the deed of feoffment. 2 Ven. 35.

<sup>h</sup> Swinb. 232.

As concerning the advancement, whereby a child may be barred from receiving a filial portion; this advancement must be by the father in his lifetime. For although another bestow any advancement, be it as much as it may, this preferment by another is no bar to the child from the recovery of a filial portion of his father's goods; much less where the child hath advanced his estate by his own industry<sup>l</sup>. And if the father bestow any thing upon another for his child's sake, or for the good of his child; this is no such preferment as will hinder a child of his filial portion<sup>k</sup>: and therefore if the father bestow any thing upon a man of trade, to take his son for an apprentice, and to teach him his mystery, this is no advancement to the effect aforesaid<sup>l</sup>; or if the father bestow any thing upon a schoolmaster, or tutor in the university, for the increase of his child's knowledge in learning, or for any degree there to be obtained; this is no advancement to exclude the child of a filial portion<sup>m</sup>.

THE advancement must be a provision made by the father of some competent thing for the maintenance of his child, whereby he may be the better enabled to live after his father's death; for if the father bestow any thing upon his child to any other end, as money in his purse to spend among his equals, or to buy him suits of apparel or books; yet this is not to be holden for an advancement<sup>n</sup>.—If a portion be given to a child in lieu and satisfaction of a filial portion, and the child be of age, and in consideration thereof doth release his future filial portion; then the child will be barred of any future claim: as a child when of age, for a valuable consideration, may release his future filial portion<sup>o</sup>.—If the father in his lifetime bestow a lease upon his child, or grant unto him an annuity for life out of his lands, though it be in such manner as the child shall not reap any benefit thereby, so long as the father lives, but after his death; this is holden for a preferment or advancement: because it was assured unto him in his father's life-time<sup>p</sup>. And if the father bestow a competent portion with his daughter in marriage upon him that shall marry her; this is such an advancement as will bar her from a demand of a filial portion<sup>q</sup>. By the word portion is to be understood, not only a sum of money, or part of the father's goods and chattels; but also lands and annuities bestowed by the father upon the son<sup>r</sup>.—Competent, signi-

<sup>l</sup> Swinb. 233.

<sup>k</sup> *Ibid.*

<sup>l</sup> *Ibid.*

<sup>m</sup> *Ibid.*

<sup>n</sup> *Ibid.* 234.

<sup>o</sup> 4 Burn's Eccles. Law, 395.

<sup>p</sup> Swinb. 234.

<sup>q</sup> *Ibid.*

<sup>r</sup> *Ibid.*

fies equal, or not far inferior to that quantity which otherwise, according to the custom of the province, should fall to be due to the child, after the rate and proportion of the father's estate, at the time when he doth bestow any such thing upon his child; for the same being equal, or not much under the rate which should belong to the child by the custom, if his father had then died, shall stand for a sufficient preferment and advancement to exclude him from a filial portion<sup>1</sup>.

It seems since Swinburn's days generally to have prevailed as the custom of the province of York, that children (exclusive of the heir at law) not advanced to their full proportion of the children's part, shall be admitted to come in for their share of the said children's part, bringing thereunto their partial advancements into hotchpot; agreeable to what Swinburn acknowledgeth to be the rule of the civil law; in conformity also to the custom of London, and to the measures of the statute of distribution, and the rules observed by the courts of equity in all such like cases<sup>2</sup>.

WHERE there is a wife, child, or children, the course of distribution of intestates effects within the province of York seems to stand thus:

If a person die intestate, leaving no wife, but an only child, which child is heir at law, or advanced, or partly advanced, or not advanced; in all these cases it makes no difference; for one way or other such child shall have the whole clear personal estate. For supposing such child to be heir at law; he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is advanced; he shall likewise have nothing by the custom, but by the statute in like manner he shall have the whole. If he is partly advanced; he shall have one half by the custom, there being no other child with whom to bring his partial advancement into hotchpot; and the other half by the statute. So in like manner, if he is not at all advanced; he shall have one half by the custom, and the other half by the statute.

<sup>1</sup> Swinb. 234.

<sup>2</sup> 4 Burn's Eccles. Law, 403.

**IF** such person hath divers children, one of whom is heir at law, and the others are advanced; in this case, with respect to the custom, it is as if he had no children: none of them can claim any thing by the custom; and (the younger children being supposed to be fully advanced) the heir at law by the statute shall have the whole. So here we may observe, as before hinted<sup>u</sup>; that as to the custom the heir at law is barred by having lands; yet by the statute he is in nowise barred by any lands that he may have had by descent or otherwise from the intestate; which we have seen in a former chapter<sup>w</sup>.

**IF** such person hath divers children, the first of which is heir at law, the second advanced, the third partly advanced, and the fourth not advanced; in this case, the child partly advanced, and the child not advanced, shall have one half equally betwixt them by the custom, the child partly advanced first thereunto bringing his partial advancement into hotchpot; and the other half (which is the dead man's part) shall be distributed by the statute equally amongst all the said children (the second only excepted, who is supposed to be fully advanced already), share and share alike. But if the heir at law hath been advanced by his father, otherwise than by lands, or as heir at law; he shall bring such advancement into hotchpot with his brothers and sisters, otherwise he shall have no distributive share by the statute.

**IN** respect of the dead man's part, which is distributable by the statute; we must observe as to this, that the representatives of children dead are admitted to a distributive share in the place of the deceased child or children whom they represent; but not so of the customary part by the custom.

**IF** a man hath a wife and no child, she shall have (besides her convenient bed and apparel) one half by the custom, and the other half (being the dead man's part) shall be distributed by the statute; of which dead man's part by the said statute she shall have one half, and the other half shall go to the next of kindred to the deceased in equal degree: so that, dividing the whole into four parts, she shall have

<sup>u</sup> Pag. 116.

<sup>w</sup> Chap. 3. pag. 67.

three, and they shall have one. But in respect to the dead man's part, although there be no child, yet if there hath been a child, and there are any legal representatives, that is, lineal descendants of such child; then of the dead man's part by the said statute, the wife shall have but one-third, and the representatives shall have the other two-thirds: so that, dividing the whole into six parts, she shall have four and they shall have two.

If a man hath a wife, and also a child or children, one of which children is heir at law, and the others are advanced; in this case, with respect to the custom, it is the same as if he had no child; and consequently the wife shall have one half by the custom, and the other half (being the dead man's part) shall be distributed by the statute; of which dead man's part, by the said statute, she shall have one-third, and the other two-thirds shall go to the heir at law; so that, dividing the whole into six parts, she shall have four, and he shall have two.

If a man hath a wife, and also a child or children, any one or more of which children are not advanced; by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute: of which dead man's part, by the said statute, she shall have one third, and the other two-thirds shall be distributed amongst the children; so that, dividing the whole into nine, she shall have four, and they shall have five.

To illustrate this, let us here for example suppose a man inhabiting within the province of York dies intestate, leaving a clear personalty of 9000l; and leaving a widow and four children; the first being heir at law to freehold lands, and having received likewise of his father in his lifetime 400l. to set him up in trade; the second advanced to the amount of 3000l; the third partly advanced, to the amount of 600l; and the fourth not at all advanced. The question is, how this personalty shall be distributed? First of all, the widow shall have one-third part by the custom, as her widow's portion, to wit, 3000l. Another third part, by the said custom, shall be distributed amongst the children; of which the heir



at law (as such) by the said custom is excluded from recovering any share; the second son also, as being fully advanced, is excluded; but hereunto the third son shall bring his partial advancement of 600l into hotchpot, and then the third and fourth sons shall divide the 3600l equally between them; but the real benefit thereof to the third son will be but 1200l and to the fourth son 1800l. The remaining third part of the said personalty, which is the dead man's part, shall be distributed by the statute; of which, by the said statute, the widow shall have one-third, to wit, 1000l; and the residue, being 2000l, shall be distributed equally amongst the said three children, viz. the heir at law, and third and fourth sons (the heir at law being let in for so much by the statute; and the second son being still excluded, as having received more than his just proportion of his father's whole personal estate); but hereunto the heir at law shall first bring his partial advancement of 400l into hotchpot, and so the said three children shall divide the whole 2400l equally amongst them; but the real benefit thereof to the heir at law will be but 400l, and to the said two younger children 800l each. So that of the whole clear personalty of 9000l, the widow shall have 4000l, the heir at law 400l, the second child nothing, the third child 2000l, the fourth child 2600l; which added together makes the 9000l<sup>x</sup>. But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband, by virtue of the custom or otherwise, she will be debarred of any share, either by the custom or statute; and in such case it will be as if there were no wife, as has been mentioned<sup>y</sup>; and consequently the children must have the whole.

By this custom, the customary share which the children are entitled to, vests in them immediately on the intestate's death; quite different to the customary share which the children of a freeman of London are entitled to by the custom of London, which does not vest in them till they are twenty-one years of age; wherefore, until they attain that age, they cannot dispose of it by will; and if they die under that age their share survives to the other children, as has been shown<sup>z</sup>. But here, as the customary share vests immediately on the in-

<sup>x</sup> 4 Burn's Eccles. Law, 407.

<sup>z</sup> Pag. 103.

<sup>y</sup> Pag. 114.

testate's death, as doth the share the children are entitled to by the statute of distribution; so that the whole is vested in them immediately on the intestate's death, and being so vested, in case either child dies under age, and without will, the share of such child will fall under the statute of distribution, and go according to the course of distribution treated of in a former chapter <sup>a</sup>. And if the infant be of the age of fourteen, if a male, or twelve, if a female, he or she may dispose thereof by will; as has been before mentioned concerning what an infant is entitled to by the statute of distribution <sup>b</sup>. — That a male infant may make a will, and thereby dispose of his goods and chattels at the age of fourteen, and a female at the age of twelve years, seems generally so to be allowed as not to admit of a doubt; provided they be of sufficient discretion. But as to real estates, by the statute 34 & 35 Hen. VIII. c. 5. sect. 14. wills or testaments made of any manors, lands, tenements, or other hereditaments; by any person within the age of twenty-one years shall not be good or effectual in law; yet by this statute, and the statute 12 Car. II. all persons of sound mind (except infants and married women) are enabled to dispose by will in writing of their whole landed property (except their copyhold tenements); concerning which particulars we shall treat in the subsequent part of our work, and therewith begin the ensuing chapter.

#### SECTION THE FOURTH.

#### OBSERVATIONS ON THE USE AND BENEFIT A WILL MAY BE TO A MAN'S FAMILY OR RELATIONS,

**H**AVING just now shewn that every man is at liberty to make a will, and thereby to dispose of his real estate, and in a former part of our work, that he may by will dispose of the whole of his personal estate to whom he thinks fit <sup>c</sup>; likewise that infants at the age of fourteen years, if males, and twelve if females, may make wills, and thereby dispose of their personal estate; and as in our explanation preceding the contents of this work, we have briefly pointed out, and progressively explained the manner of the law's disposal in case of intestacy, by which the utility

<sup>a</sup> Chap. 3.

<sup>b</sup> Pag. 113.

<sup>c</sup> Pag. 101.

of a will in a variety of cases may readily be perceived ; we shall here make some brief observations on the use and benefit the same may be to such of a man's family or relations who would be legally entitled to his estate and effects in case he died intestate. And to this end we will first suppose a man to have relations, several of whom may be entitled to the administration of his estate, and he makes his will, and appoints one or more executors, and thereby gives his relations his personal estate, just in the same proportion as the law would entitle them thereto in case he had died intestate, and left it to the disposition of the law : now by means of the will, for which some at first sight may be apt to think there was little occasion, much altercation may be prevented ; as thereby all disputes and controversies concerning who should have the administration will be totally excluded, no room being left for dispute ; and therefore it is probable very considerable expence will be saved ; for as we have seen in the first chapter of this book, there may be room for contending who should, and who should not have the administration ; and in the second chapter, we may perceive there are many circumstances that might excite those entitled thereto, rigorously to contend for it ; which having too often been the case, and the determining who should have the administration attended with such expence and detriment to the parties concerned, as ultimately to render the intestate's personal estate of little or no benefit to them.

NEXT let us suppose a man to die intestate, leaving a wife and several children who are of age, and equally entitled to the administration with their mother ; yet all amicably agree to suffer their mother alone to administer their deceased father's estate ; and that one or more of those children have been advanced by their father, either in part or to the full amount of their share of his personal estate. Now although those children may all have amicably agreed to suffer their mother to administer, yet it may not only require some consideration for the administratrix to ascertain this advancement, and so to make a just and equal distribution amongst them, pursuant to the statute of distribution ; and (if the intestate be

be a citizen of London, or an inhabitant of the province of York, where the customs interfere with the statute) to make distribution pursuant to those customs and the statute; but it will probably require much more consideration, as well as a deal of pains and trouble for the administratrix, after she has allotted each of those children their lawful share, to convince them that it is the whole each can demand; so that all may be satisfied of justice being done, and thereby be prevented from calling in the aid of counsel, or some person learned in the law, if not the aid of a court of equity, to satisfy them respecting their shares of their deceased father's estate; which latter aid having been often required when the former could not satisfy, the consequence hath been, that considerable sums of money have been spent in litigation, and that not only to the great loss, but even to the utter ruin of some of the intestate's children; which might totally have been prevented, had he made a will with good advice, as by the assistance of some person sufficiently versed in the law.

AGAIN, let us suppose a man to die intestate, leaving no wife, but a child or children, who may not be of the age the law requires to administer his estate. Here, as concerning the personal estate, the ordinary assigns some person to take care thereof, and to provide for the infant's maintenance and education<sup>d</sup>. Whereas the father might by will have vested his estate in one or more of his judicious friends to have taken care thereof, and to have disposed of it at such times, and in such manner as he might have directed; by which means he would not only have had one or more persons of his own choosing to take care of his estate for his children, and to distribute it to them according to his own direction, but would have saved the expence which the ordinary's assignment is attended with, and which ceases when either child attains twenty-one years of age, on which a new administration is granted; the expence whereof, as well as of that which ceases, is somewhat more than the expence of

<sup>d</sup> Black Com. 1 V. 461. 463.

general letters of administration : so that in this case here is perhaps more than double the expence to come out of the deceased's estate than the proving his will (if he had made a will) would have been attended with ; and probably much greater expence than this, the children, when of proper age, may be occasioned, by calling the person assigned by the ordinary to account, and in getting his account settled and adjusted.

CONCERNING the utility of a will, and the benefit it may be of to a man's family or relations, much more might be said ; as any person after reading this work may clearly perceive, and thereby see that such advantage may redound to a man's family or relations by a will, as to be convinced that the small expence of employing counsel, or a person sufficiently versed in the law for making it, is not an object to be compared with the hazard of litigation that might be occasioned by a person's dying intestate ; and the loss and detriment his family or relations may thereby sustain.—By a will made with good advice, or by the assistance of a person sufficiently versed in the law, the testator's estate may be given and disposed of so as not to leave the least room for dispute or litigation ; yet if the will be not made with good advice, it may be attended with as bad consequences as if the testator had died intestate, and left his estate to the disposition of the law ; and this is obvious to every person who has been conversant with the books of report, or hath attended the courts of justice ; and it is observed by Sir William Blackstone<sup>c</sup>, that an ignorance of the forms which the policy of the laws hath made necessary for the wording of last wills and testaments, and of the attestation, must be of dangerous consequence to such as compile their own testaments without any assistance ; and that those who have attended the courts of justice, are the best witnesses of the confusion and distresses that are thereby occasioned in families, and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all ; so that in the end his estate may be vested quite contrary to his intentions ; because he has perhaps omitted one or two formal

<sup>c</sup> Com. 1 V. 7.

words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

As an illustration of those observations will appear in the ensuing part of this work, where the testator has such instructions for making his will, as by due attention thereto, he may be assisted and enabled to make it with accuracy; unless his estate should be so fettered with intails, or entangled by settlements or conveyances, as to render him incapable of forming a just conception thereof; and under such circumstances as well as when the estate is of very considerable value, it is advisable for him to apply to counsel, or some person well versed in the law, for further information: we shall now conclude this part of our work by just mentioning that as it hath been presumed, where a will has been made contrary to the interest and inclination of some of the testator's family or relations, the same unknown to him has been destroyed before his death, or concealed afterwards; and thereby notwithstanding the care he may have taken to dispose of his estate and effects, the same have been left to the disposition of the law: for preventing such misfortune we may observe lord Coke's advice; which is to make two parts of the will, and to leave one part thereof in the hands of a friend<sup>f</sup>; either of which parts may be proved, and hereby the testator's will may be secured; and if he should have a mind to cancel it at any time before his death, this will in no wise prevent or hinder him from so doing; no more than if there was only one part. For the cancelling of one part when the same is done with an intention to destroy the will, is as the cancelling of both, and a good revocation of the whole will<sup>g</sup>.—Where the estate and effects are of any considerable value, this method of making the will in two parts, and leaving one part thereof with a friend, is commonly used.

<sup>f</sup> 3 Co. Rep. 36.

<sup>g</sup> 1 P. Will. 346. Note 1. 4 edit. The destroying the will by cancelling the duplicate, depending on its being done with a mind or intention to revoke (unless the testator makes another will, and thereby effectually revokes the former, concerning which we shall treat in a subsequent part of our

work, p. 163); it would be well for him at the time of cancelling the duplicate to mention his intention to some disinterested person, or to make a memorandum thereof in writing, which might be subscribed by witnesses similar to the form we have laid down for republishing a will in page 169.

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T H E

DISPOSAL OF A PERSON'S ESTATE BY  
WILL AND TESTAMENT.

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C H A P. I.

*The Power a Man hath for disposing of his Property by Will. What he may not dispose of by Will. Estates to be so disposed of as not to be rendered unalienable after a certain Time.*

**I**N the former part of this work it has been shewn, that all persons may by will dispose of their personal estate to whom they think fit<sup>a</sup>; and that male infants, if they are of sufficient discretion at fourteen, and females at twelve years of age, may dispose of their personal estate by will<sup>b</sup>. Personal estate is generally understood in contradistinction to real estate, as money, goods, and chattels, particularised in the second section of the second chapter of the law's disposal, and there shewn by what will go to the administrator<sup>c</sup>. As to real estate<sup>d</sup>, by statute 34 & 35 Hen. VIII. c. 5. and by virtue of the statute 12 Car. II. c. 25. all persons (except married women, infants, idiots, and persons of nonsane memory) are empowered to dispose by will in writing of the whole of their landed property (except their copyhold tenements) to whom they think fit, unless it be to bodies corporate<sup>e</sup>; and that even to the total disinherison of the heir at law, notwithstanding that erroneous opinion which some entertain of the necessity of leaving the heir a shilling, or some other express legacy, in order to disinherit him effectually.

<sup>a</sup> Page 101.

<sup>b</sup> Page 113. 122.

<sup>c</sup> Page 28—36.

<sup>d</sup> Defined, Page 86.

<sup>e</sup> Black. Com. 2 V. 375, 376.

THUS has the legislature enabled persons to dispose of their landed property to any person or persons, except it be to bodies corporate, the reason of which exception will be shewn hereafter<sup>e</sup>. And as to freehold estates held by one person during the life of another, styled estates *pur autre vie*, those are also devisable by will, as may be perceived by what has heretofore been mentioned<sup>f</sup>. But no provision being yet made with respect to copyhold estates, the power of devising is now indirectly exercised over those by an application of the doctrine of uses, similar to that which was anciently resorted to in respect to freehold lands; for the practice is to surrender to the use of the owner's last will, and on this surrender the will operates as a declaration of the use and not as a devise of the land itself<sup>g</sup>. So from hence we may observe that the testamentary power is now exercisable either directly or indirectly over land of every tenure now in use where the same is not held in joint-tenancy, or fettered with intails, of which we shall hereafter make mention. But with respect to land, or real estate, it must be observed, that a devise will not operate thereon, unless the testator is in possession thereof at the time of executing his will; yet as to personal estate it will operate upon whatever a man has thereof at the time of his death, concerning which we shall see more in a subsequent chapter<sup>h</sup>.

WHERE there is a general devise of lands, and there is no surrender of the copyhold lands to the use of the will, the construction at law is, that those do not pass by the will; copyhold lands not being properly the subject of a devise, and therefore do not pass by the will, but by the surrender<sup>i</sup>. So if I would devise a copyhold estate I must surrender it to the use of my will, otherwise, after my death application must be made to a court of equity for supplying the defect thereof, which the court will do in some cases, as in favour of a *child* or *widow*,

<sup>e</sup> Page 136.

<sup>f</sup> Page 49.

<sup>g</sup> Co. Lit. 111. Note 1. 13 edit.

<sup>h</sup> Page 169, 170.

<sup>i</sup> 1 Atkyns 388. In a case before Sir Lloyd Kenyon, master of the rolls, sitting for lord chancellor, May 1786, his honour determined that a mere

draught of a will, the signing and publication whereof were prevented by the sudden death of the testator, yet being proved in the ecclesiastical court as a testamentary paper, was sufficient to pass copyholds, which the testator had before surrendered to the use of his will. 2 Bro. Cha. Rep. 58.



and in favour of creditors where there is a devise of real estate to pay debts, and there is no real estate but copyhold<sup>k</sup>.

CONCERNING infants, married women, idiots, and persons of nonsane memory, more will be said hereafter under a subsequent head; and here we may observe, that notwithstanding the law has given a man a large and extensive power for disposing of his property by will, yet there are some estates and effects which he may by *deed* or otherwise dispose of in his life-time, but is not allowed to dispose thereof by will; and those shall be our next subject:

AND here we shall first advert to what has been mentioned in the former part of this work, that all such chattels personal as a woman is possessed of, immediately on marriage vest in her husband; and that her chattels real he may make his own if he pleases<sup>l</sup>. The former of those he may dispose of by will to whom he thinks fit; but the latter, unless he exercised some act of ownership to make them his own, as in case of leasehold estates for years, or for years determinable upon lives, he may surrender the leases, and take new leases, or sell the estates and repurchase them, otherwise those will not pass by his will, but on his death will return to his wife; yet if he survives her, will be his own to all intents<sup>m</sup>. So it will be in respect of any debts that were due to the wife before marriage, and which were not received or got in by the husband and wife during their joint lives. So likewise it will be in respect to the wife's *paraphernalia* described in the former part of this work<sup>n</sup>.

As to joint-tenancy, if any estate either real or personal is held in joint-tenancy, it cannot be devised by will; for a devise of an estate whereof the devisor is jointly seised is void, the will not taking effect till after the death of the devisor, and by his death all the estate presently comes by the law to

<sup>k</sup> Law of Test. 171. 4 Burn's Eccles. Law, 59: Where the real estate generally is devised for, or charged by will with, payment of debts, copyhold lands which are not surrendered to the use of the will, do not pass thereby, if there be freehold sufficient to answer the purpose; otherwise it shall and the court will supply the surrender. Yet the freehold, if any, shall be first applied; but this is to be understood of the legal estate only, for an equitable estate of copyhold will pass by such devise without surrender. 3 P. Will. 98. Note 2.

4 edit. as where a copyholder has mortgaged his copyhold and the mortgagee is admitted, the mortgagor, not having the legal estate of copyhold in him, has no estate that he can surrender, and therefore may devise the copyhold premises without any surrender, *Ibid.* 360. Note 1. as also he may where the legal estate is in trustees. 2 Atk. 38. Bro. Cha. Rep. 481.

<sup>l</sup> Page 3.

<sup>m</sup> 4 Co. Rep. 51.

<sup>n</sup> Page 36, 37.

his companion which surviveth<sup>o</sup>, and who takes the whole by prior title<sup>p</sup>.—The nature and effects of joint-tenancy being very necessary to be understood, I shall here be somewhat particular in describing it; and then shew how a joint-tenant may obtain power for devising his part by will. Joint-tenancy is where two or more persons come to and hold an estate jointly by one title, and those persons are called joint-tenants, because the estate is conveyed to them jointly; as where a man is seised or possessed of an estate in fee-simple, and makes a conveyance to two or more and their heirs, or makes a lease to them for life, or where two or more have a joint estate in a chattel real or personal, or a joint estate in a debt, duty, covenant, contract, &c. it is a joint-tenancy, and the part of him that dies goes not to his heir, executor, or administrator, but the whole to the survivors or survivor<sup>q</sup>; and a will made by a joint-tenant during the continuance of the joint-tenancy is not a good will, even as to his share of the estate under the statute of wills, notwithstanding a subsequent severance of the joint-tenancy by a partition made *after* the making of the will and *before* the testator's death, unless there be a republication of it after the partition<sup>r</sup>. But as to joint-merchants for the wares, merchandizes, debts or duties, that they have as joint-merchants or partners, the same shall not survive but shall go to the executors or administrators of him that dieth, by the law of merchants, which is part of the laws of this realm for the advancement and continuance of commerce and trade, as being for the public good<sup>s</sup>. And for the encouragement of husbandry and trade, it is held, that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking by way of partnership in trade, shall always be considered as common and not as joint-property, and there shall be no survivorship therein<sup>t</sup>. So that it may be in the power of the joint-merchant, joint-trader, or farmer, to devise his share by will; and in case he dies without will, the same shall go to his administrators, as his other personal estate; yet in deeds of partnership it is usual to insert a covenant for this purpose.

IN order to shew how one joint-tenant may obtain power to devise his part by will, we may first take notice of the difference between joint-tenants and those called tenants in common; and then proceed to shew how a joint-tenancy may be turned into a tenancy in common by either of the

<sup>o</sup> Co. Litt. 185, 186.

<sup>p</sup> Gilb. on Wills, 123.

<sup>q</sup> Black. Com. 2 V. 399.

<sup>r</sup> Burr. Mansf. 1488.

<sup>s</sup> Co. Litt. 182.

<sup>t</sup> Black. Com. 2 V. 399.

tenants, and from that brought into a separate estate. Joint-tenants have the estate by one joint title and in one right, and tenants in common by several titles, or by one title and by several rights, but this property is common to them both, viz. that their occupation is undivided, and that neither of them knoweth his own separate part <sup>u</sup>, both having a unity of possession, so that neither tenant is possessed of any particular part of the estate, but each hath a share in and throughout the whole; and, as has been observed, an estate held in joint-tenancy goes to the survivors or survivor, and never descends to the heir nor goes to the executor or administrator of the deceased, except in the case of joint-merchants, traders, &c. But an estate held by a tenancy in common, either of the tenants may dispose of his part to whom he pleases by will, and the devisee or devisees to whom the same is devised will have a good title thereto; and in case the estate is not devised by will, and one of the tenants thereof dies intestate, his share will descend or go to his issue or next of kin <sup>v</sup>.

THE creation of an estate in joint-tenancy depends on the wording the deed or devise by which the tenants claim title; for this estate can only arise by purchase <sup>x</sup> or grant, that is, by the act of the parties, and never by mere act of law <sup>y</sup>. If an estate be given to two or more persons without adding any restrictive, exclusive, or explanatory words, as if an estate held in fee-simple be devised to A and B and their heirs, this makes them joint tenants in fee thereof; so if it be given to A and B for their lives, it makes them joint-tenants for life. So if a chattel real, as a leasehold estate for years, or any chattel personal, as a horse, a piece of plate, or any household goods, be given to two or more persons without adding any restrictive, exclusive, or explanatory words, they are joint-tenants thereof. A tenancy in common may be created by express limitation, but care must be taken not to insert words which imply a joint-estate; but as in this respect there is great nicety in wording of wills as well as deeds, it is the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate, whether real or per-

<sup>u</sup> Co. Litt. 289.

<sup>v</sup> Hawkins's Abr. Co. Litt. 267.

<sup>x</sup> The word purchase is defined, Page 69.

<sup>y</sup> Black. Com. 2 V. 189.

sonal, to A and B [*the persons to whom it is limited*] to hold as tenants in common, and not as joint-tenants<sup>a</sup>.

JOINT-TENANCIES may at any time be turned into tenancies in common at the election of either of the joint-tenants; for if one joint-tenant aliens or conveys his estate to a third person, the joint-tenancy is severed and turned into a tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent grantor); and if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure<sup>a</sup>; so if there be three joint-tenants and one of them aliene that which to him belongeth to another, in this case the alienee is tenant in common with the other two joint-tenants, but the other two are seised of the two parts which remain jointly, and of these two parts survivorship will take place<sup>b</sup>; and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure<sup>c</sup>. When a joint-tenancy is turned into a tenancy in common, any of the tenants in common, as has before been observed, may devise their share by will, or the same if not devised will descend or go to their issue or next of kin<sup>d</sup>; yet the devisees or issue will not have an estate in severalty or any separate estate, but will still be tenants in common, and till partition made, the unity of possession will continue; for there are only two ways by which estates held as tenancies in common can be dissolved; the one is by uniting all the titles and interest in one tenant by purchase or otherwise, whereby the whole may be brought to one severalty, or the whole estate vested in one of them; the other is by making partition<sup>e</sup>, which if they mutually agree, they may make when they please between themselves; but if they cannot mutually agree to divide, they may have recourse to the writ framed upon the statutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. whereby all joint-

<sup>a</sup> Black. Com. 2 V. 194.

<sup>b</sup> *Ibid.* 185, 186.

<sup>c</sup> Co. Litt. 189.

<sup>c</sup> Black. Com. 2 V. 186.

<sup>d</sup> Page 131.

<sup>e</sup> Black. Com. 2 V. 194.

tenants and tenants in common, either of estates of inheritance or other less estates, are compellable to make partition<sup>f</sup>.

FROM hence we may perceive, that a man by his own act may obtain power for disposing by will of his share in the estate which he held in joint-tenancy. So where a man is seised of such estate in fee-tail as by virtue of a fine or recovery may be conveyed, of which mention is made in the appendix to this work<sup>g</sup>; he may obtain power to devise the same by will. But if the joint-tenant, or tenant in tail, makes his will before severance of the joint-tenancy, or barring the intail, the devise will be void, unless the will be afterwards republished by the testator<sup>h</sup>. With respect to dower, mentioned in the former part of this work<sup>i</sup>, we may here, by way of reminding the reader of what has heretofore been said concerning it, just observe, that a wife cannot be barred thereof by her husband's will, unless after his death she accepts of any thing given her thereby as in lieu or satisfaction for her dower.

HAVING thus shewn what a man may, and what he may not, dispose of by will, we come now to treat on the disposal of estates in such manner as the same may not thereby be rendered unalienable after a certain time.

ALTHOUGH, as it has been observed, a man may by will dispose of his landed property to whom he thinks fit, and that even to the total disinherison of the heir at law, yet he must dispose of it in such manner as that it may be aliened or conveyed within such time as the law hath fixed; in order that it might thereby be rendered capable of answering the purposes of commerce, and providing for the innumerable contingencies of private life<sup>k</sup>; and therefore the estate must not be so devised as to create what the law calls a perpetuity. As where a devise was made to the Drapers Company and their successors in trust, to convey the estate

<sup>f</sup> *Ibid.* 185.

<sup>g</sup> See page 242.

<sup>h</sup> See republishing a will mentioned, page 168, 169.

<sup>i</sup> Page 96.

<sup>k</sup> Black. Com. 2 V. 174.

to the devisor's grandson *Matthew Humberston* for life, and afterwards, on the death of the said *Matthew*, to his son for life, and so to the first son of that first son for life, &c. and if no issue male of the first son, then to the second son of the said *Matthew Humberston* for life, and so to the first son, &c. and in failure of such issue of the said *Matthew*, then to another *Matthew Humberston* for life, and to his first son for life, &c. with remainders over to many of the *Humberstons* (as the reporter thinks, about fifty) for their lives successively, and their respective sons, when born, for their lives, without giving any estate in tail to any of them, or making any disposition of the fee. This case being brought before the court of chancery, it was held by Lord Cowper, that this attempt to make a perpetual succession of estates for life was vain and impracticable, and that there ought to be a strict settlement made, and the intent of the testator followed as far as the rules of law would admit; and his lordship directed a settlement to be made, so that such who were in being should be only tenants for life; but where the limitation was to a son not in being, there he must be made tenant in tail<sup>1</sup>; who, when of age, may be enabled by suffering a recovery, if not by passing a fine, to sell and convey the inheritance, which a tenant for life cannot alone obtain power to do, as will be shewn in the appendix to this work, as also how real estates may be devised with remainders in tail<sup>m</sup>.

WITH respect to executory devises, a brief description wherof we shall see hereafter<sup>n</sup>; the utmost length that has been hitherto allowed for the contingency of an executory devise to happen in, is that of a life or lives in being, and one and twenty years afterwards; as when lands are devised to *such* unborn son of a feme-covert *as* shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, whereby the inhe-

<sup>1</sup> Gilb. on Wills, 159. Law of     <sup>m</sup> See Clause 5. Page 239—242.  
 Test. 155. 1 P. Will. 333. Note 1.     <sup>n</sup> Page 149.  
 4 edit.

ritance may be aliened or conveyed, being the life of the mother and the subsequent infancy of her son.

As to chattels real<sup>o</sup>, which may be devised with limitations over; in order to prevent the danger of perpetuities, it has been settled, that those may be devised to one for life, and after his death to another for life, which is termed limiting over, and so to as many persons as are in being; but all the persons must be in being during the life of the first devisee, or person to whom first devised, as then all the candles are lighted and consuming together, and the ultimate remainder, as it is termed, is in reality only to that remainder-man who happens to survive all the rest: or, that such remainder may be limited to take effect upon such contingency only as must happen (if at all) during the life of the first devisee<sup>p</sup>. But of this see more at the bottom of the next ensuing page.

**LIMITATIONS** of chattels personal, in remainder after a bequest for life, are in like manner permitted, though formerly that indulgence was only shewn where merely the use of the goods, and not the goods themselves, was given to the first legatee, the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded; and if a man, either by deed or will, gives or devises his books or furniture to A for life, with remainder after the death of A to B, this remainder to B is good<sup>q</sup>; and it has been held that B might exhibit a bill against A to compel him to give security that the goods shall be forthcoming at his decease. But, in the case of *Foley and Burnet*, March, 1783. By lord chancellor Thurlow: the cases as to tenant for life giving security for the goods have been over-ruled, and the court now demands only an inventory, which is more equal justice; as there ought to be danger, in order to require security<sup>r</sup>. With respect to bequests of chattels with limitations over, we must observe, that where an estate-tail in things personal is given to the first or

<sup>o</sup> Described, page 28, 29.

<sup>q</sup> Black. Com. 2 V. 398.

<sup>p</sup> Law of Test. 82. Black. Com.

<sup>r</sup> Bro. Cha. Rep. 279.

2 V. 174.

any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee-simple which a tenant in tail may acquire in a real estate\*. So upon the same principle, if a sum of money is intailed, all subsequent limitations over will be barred†.

By this it may be perceived, that notwithstanding the law has vested persons with great power for disposing of their real and personal estates by will, yet it has not left them to their own vain humour and caprice in disposing thereof, but judiciously prescribed bounds whereby those estates may be rendered most beneficial to the succeeding generation; and upon those principles, and to prevent the extensive gifts in mortmain, corporations were excepted in the statute<sup>34</sup> and 35 Hen. VIII. as the gift to a corporation which never dies must tend to a perpetuity.

It having been held that the statute 23 Hen. VIII. did not extend to any thing but superstitious uses, and that therefore a man might give lands for the maintenance of a school, an hospital, or any other *charitable* uses; it was

\* Black. Com. 2 V. 398.—In the case of terms of years and personal chattels, the vesting of an interest which in reality would be an estate tail, bars the issue and all the subsequent limitations; but terms of years and personal chattels may be intailed by executory devise or by deed of trust, as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being and 21 years after, and perhaps in the case of a *posthumous* child a few months more; a limitation of time wisely adopted in analogy to the case of freeholds of inheritance, which cannot be

so limited by way of remainder as to postpone a complete bar of the entail by fine or recovery for a longer space. By a series of decisions every species of property is in substance equally capable of being settled in the way of entail, and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed *almost* as nearly within the same limits as the difference of property will allow. Co. Litt. 20. Note 5. 13 edit.

† 4 Burn's Eccles. Law, 144. 2 Bro. Cha. Rep. 33. 127.



apprehended, that persons on their death-beds might make large and improvident dispositions even for those good purposes, and thereby defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36. that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, *to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, limited, or appointed by will, to any person or persons, bodies politick or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable use whatsoever; but such gifts shall be by deed indented, sealed, and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor, and be inrolled in the high court of chancery within six calendar months after the execution, and the same to take effect immediately after the execution for the charitable use intended, and be without any power of revocation, reservation, or trust for the benefit of the donor. And all gifts and appointments whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or any personal estate, to be laid out in the purchase of any lands, tenements, or hereditaments, or any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable use whatsoever, made in any other manner than is directed by this act, shall be absolutely null and void.* But the two universities, their colleges, and the scholars upon the foundation of the colleges of Eaton, Winchester, and Westminster, are excepted out of this act; but with this proviso, that no college shall be at liberty to purchase more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations.

UPON the construction of this statute it hath been determined, that if a man deviseth his land, that is, real estate

(which the law terms land, and agreeable thereto I have sometimes used the word land, instead of the words real estate, which imply one and the same thing), to trustees to be turned into money, and that money to be laid out in a charity, the devise is not good; for it is an interest arising out of land. So a devise of a mortgage or of a term for years to a charity is not good. And if money be given to be laid out in lands, this is expressly within the act, but money given generally is not; concerning which more particular mention will be made, after we have treated on legacies, under a subsequent head<sup>r</sup>,

## C H A P. II.

*Of making the Will.*

**T**HE power persons have and may obtain for disposing of their estates and effects by will, having now been treated on, and likewise the bounds prescribed by the law as limits to that power; whereby some of the requisites necessary to be observed in making the will may be perceived, we shall here proceed to treat on further requisites necessary to be attended to; and first take notice of persons who being under some special prohibition by law or custom, as for want of sufficient discretion, or for want of sufficient liberty and free will, or on account of their criminal conduct, are obliged to die intestate; and then consider the manner of making the will, whereby both real and personal estate is given or bequeathed, and where the will only concerns personal estate: who may be made executors, and of whom the testator should beware of appointing; who may be devisees, and take by devise; and the manner of their taking real and personal estate by the will: the manner of bequeathing to married women and infants, and of appointing guardians: conditions not to trouble executors, and for preventing indiscreet marriages: the nature and effects of a gift in case of death; and of a nuncupative or verbal will.

<sup>r</sup> See page 214.

As to persons restrained from making wills for want of sufficient discretion, some of those are infants, ideots, and persons of nonsane memory, who with married women are excepted out of the statute 34 & 35 Hen. VIII. c. 5. before mentioned<sup>a</sup>; so that infants or persons under twenty-one years of age, who are stiled infants till then, cannot by will dispose of their real estate; yet, as has been shewn, may thereby dispose of their personal estate at certain ages. And aliens, who were mentioned in the third section of the fourth chapter of the former part of this work, as not being capable of holding lands<sup>b</sup>, consequently can never have any to dispose of; yet aliens may acquire a property in goods, money, and other personal estate, here in England, and dispose thereof by will, provided they are alien-friends, or such whose countries are at peace with ours<sup>c</sup>.

AMONGST those persons disabled from making wills for want of sufficient discretion, as ideots and persons of nonsane memory, may be reckoned such persons as are grown childish by reason of old age or distemper, and such as have their senses befotted with drunkenness; all of whom are incapable, by reason of mental disability, to make any will so long as such disability lasts. To these also may be referred such persons as are born deaf, blind, and dumb; who having always wanted the common inlets of understanding, are incapable of having, as it is termed, *animum testandi*; and therefore any will made by them is void<sup>d</sup>.

AN ideot, or natural fool, is he who, notwithstanding he be of lawful age, yet he is so witless that he cannot number to twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to answer any such easy question; whereby it may plainly appear that he hath not reason to discern what is to his profit or damage, nor is apt to be informed or instructed by any other;

<sup>a</sup> Pag. 127.

<sup>b</sup> Page 97.

<sup>c</sup> Black. Com. 1 V. 372.

<sup>d</sup> *Ibid.* 2 V. 497.

and such an idiot cannot make any testament, nor dispose either of his lands or goods<sup>y</sup>. An old man, who, by reason of his great age, is grown childish again, or so forgetful, that he forgets his own name, cannot make a will; for a will made by such an one is void<sup>z</sup>. A drunken man, when so excessively drunk as to be deprived of his reason and understanding, during that time may not make a will; for it is requisite, when the testator makes his will, that he should be of sound memory, and that he hath a competent memory and understanding to dispose of his estate with reason<sup>a</sup>. A man of a mean understanding, neither of the wise or foolish sort, but indifferent, as it were, betwixt a wise man and a fool, and though he rather incline to the foolish sort, such an one is not prohibited to make a testament, unless he be yet more foolish, and so very simple, that he may be easily made to believe things incredible or impossible, and hath not as much wit as a child may have at ten or eleven years of age, who is therefore intestable by the law for want of judgment<sup>b</sup>.

MADFOLKS and lunatic persons,<sup>1</sup> during the time of their furor or insanity of mind, cannot make a testament, nor dispose of any thing by will, because they do not know any thing they do; for in making a testament, the integrity or perfectness of the mind, and not health of the body, is requisite<sup>c</sup>. And so strong is this impediment of insanity of mind, that if the testator makes his testament after his furor hath overtaken him, and whilst it doth possess his mind, although the furor doth after depart or cease, and the testator doth recover his former understanding, yet the testament made during his former fit doth not recover any force or strength thereby<sup>d</sup>. But if a mad or lunatic person has a clear or calm mind, then during the time of such his quietness and freedom of mind he may make his testament<sup>e</sup>.

<sup>y</sup> Law of Test. 41. 4 Burn's Eccles. Law, 44.

<sup>b</sup> *Ibid.* sect. 4.

<sup>z</sup> Swinb. part 11. sect. 1. 6 Co. Rep. 23.

<sup>c</sup> Law of Test. 39. 4 Burn's Eccles. Law, 44.

<sup>a</sup> Swinb. part 11. sect. 1.

<sup>d</sup> Law of Test. 39.

<sup>e</sup> *Ibid.* 4 Burn's Eccles. Law, 44.

EVERY person is presumed to be of sound mind and memory unless the contrary be proved ; and therefore, if any person goes about to overthrow a testament, by reason of insanity of mind or want of memory, he must prove the impediment <sup>f</sup>, which is a hard and difficult point : and therefore it is not sufficient for the witnesses to depose that the testator was mad or beside his wits, unless they render or yield a sufficient reason to prove this their deposition, as that they did see him do such things, or heard him speak such words, as a man having reason would not have done or spoken <sup>g</sup>.

As persons who are born blind, deaf, and dumb, are incapable of making any will, so likewise are those who are deaf and dumb by nature ; unless it appears by sufficient arguments that such a person understandeth what a will means, and that he hath a desire to make a will ; for if he have such understanding and desire, then he may make his will by signs and tokens <sup>h</sup>.

A BLIND PERSON may make a nuncupative will, by declaring his mind before a sufficient number of witnesses ; and he may make his will in writing, provided it be read to him before witnesses, and in their presence acknowledged by him for his last will ; but if a writing be delivered to a blind man, and he, not hearing the same read, acknowledges it for his will, this will not be sufficient ; for it may be, if he had heard the same read, he would not have acknowledged it for his will <sup>i</sup> ; therefore, the best and safest way in such case is, that the will be read over to the testator, and approved by him in the presence of *all* the subscribing witnesses : yet the law of England doth not seem precisely

<sup>f</sup> Law of Test. 40. 4 Burn's Eccles.

Law, 44.

<sup>g</sup> *Ibid.*

<sup>h</sup> Law of Test. 44. 4 Burn's Eccles.

Law, 54.

<sup>i</sup> Law of Test. 45. 4 Burn's Eccles.

Law, 55.

to require this strictness, if there be otherwise satisfactory proof of the will being read over to the blind man, as the single oath of the writer hath been allowed sufficient to prove the identity of the will <sup>k</sup>.

THE same precautions as are necessary for authenticating a blind man's will, seem in like degree requisite in the case of a person who cannot read; for though the law in other cases may presume that the person who executes a will knows and approves the contents of it, yet that presumption ceaseth where, by defect of education, he cannot read, or by sickness is incapacitated to read the will at that time <sup>l</sup>.

PERSONS for want of sufficient liberty and free will, being incapable of making wills as before mentioned, are the next class here to be considered, and the first of these I shall take notice of is a married woman.

A MARRIED WOMAN is utterly incapable of disposing of her real estate, either by will or deed, as has been shewn <sup>m</sup>; and as to her chattels real and personal, the latter of those we have seen immediately vest in her husband on the marriage, and the former he may make his own if he chooses <sup>n</sup>; wherefore she is incapable of disposing thereof unless her husband should consent to her so doing, which is not likely he should, as it would be very inconsistent to give her a power of defeating the law in this respect, by enabling her to bequeath those chattels to another.

By the husband's consent the wife may make a testament, and as the husband before marriage frequently becomes bound in a bond, or covenants with some of the woman's friends to give her such consent, he is bound by his bond or covenant so to do; but unless such consent be given to

<sup>k</sup> 4 Burn's Eccles. Law, 55.

<sup>l</sup> *Ibid.*

<sup>m</sup> Page 96.

<sup>n</sup> Page 3. 129.

the particular will in question, it will not be complete even though the husband beforehand hath given her permission to make a will ; yet it shall be sufficient to repel the husband his general right of administering his wife's effects (which otherwise he has a right to<sup>o</sup>), and administration shall be granted to the wife's appointee<sup>p</sup>, or the person appointed by the wife.

WHEN a married woman dies, who by will or writing hath disposed of effects by power derived from a bond, settlement, or a will ; before such will or writing of the woman's is proved in the ecclesiastical court, the ordinary will require the husband's consent, either in person or by proxy, a person appointed by the husband for that purpose, and if that cannot be obtained (as sometimes the husband will absolutely refuse such consent), then the ordinary will require the bond or settlement from which the wife derived her power, to be produced, and after abstracting it, will grant a probate or administration ; that is, if the wife hath appointed an executor, the ordinary will grant a probate ; if the wife hath not appointed an executor, but made only a kind of testamentary disposition in writing, then the ordinary will grant administration with such testamentary disposition annexed ; and in case the husband's consent hath not been obtained, but instead thereof the bond of settlement hath been produced, the contents thereof issues with the probate or administration from the ordinary ; and this will be attended with expence according to the length of the bond or settlement, which, if very long, the extraordinary expence will be considerable, perhaps upwards of 20*l.* wherefore it is best to obtain the husband's consent if it can be had. — If the wife disposes by power derived from a will which hath been proved, and the husband with-holds his consent, the extraordinary expence of obtaining the probate or administration

<sup>o</sup> See pag. 3.

<sup>p</sup> Black. Com. 2 V. 498.

will be very trivial, to what it will be when the power is derived from a settlement of any considerable length.

By this it may be perceived how marriage alters the power that a woman before the consummation thereof has over her estate and effects; and in respect to a will, if she should have made any before marriage, the same can be of no effect after her marriage, that being a revocation in law, and entirely vacates the will<sup>q</sup>. If she makes any will during marriage, and dies in her husband's life-time, we have seen that it will be effectual with having her husband's consent, and being made pursuant to the power she had for that purpose; but if she makes her will during marriage, and survives her husband, it will not be effectual unless after her husband's death she approves and confirms the same, whereby it becomes as a new will<sup>r</sup>.—If a married woman has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by any writing in nature of a will without the control of her husband<sup>s</sup>, and if she survives him, shall have it herself, and the same shall not be liable to her husband's debts<sup>t</sup>.

WHERE the wife hath goods in the right of another person as executrix or administratrix, and not as legatee, of these she may by will appoint an executor, and such will of the wife's does not require the husband's consent: for in default of her appointing an executor, the testator's next of kin will be entitled to the administration, as was mentioned in the former part of this work<sup>u</sup>.

THAT sufficient liberty and free will is necessary to the making a will, it may be observed, that if the same is made by a person through fear in consequence of threatening, and which being such fear as may move a constant man, as the fear of death or bodily hurt, or of imprisonment, or the

<sup>q</sup> 4 Co. Rep. 60.

<sup>r</sup> 4 Burn's Eccles. Law, 47.

<sup>s</sup> Black. Com. 2 V. 499.

<sup>t</sup> 4 Burn's Eccles. Law, 49.

<sup>u</sup> Pag. 3.



loss of all or most part of his goods, or the like; it will be set aside: yet as to this no certain rule can be delivered, but it is left to the discretion of the judge, who will not only consider the quality of the threatening, but also the person as well threatening as threatened; in the person threatening his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like. But if the testator afterwards, when there is no cause of fear, do ratify and confirm his will, the same is then good in law <sup>x</sup>.

FRAUD or deception relating to a will of personal estate is examinable only in the spiritual or ecclesiastical court; but in respect of a real estate, it was decreed in the house of lords that a will thereof could not be set aside in a court of equity for fraud or imposition; but must be tried at law, being a matter proper for a jury to inquire into <sup>y</sup>.

PERSONS incapable of making wills on account of their criminal conduct are the next class here to be considered; and the first of those we shall take notice of are traitors.

A TRAITOR, or one who has judgment awarded against him for high treason, forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his right of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist <sup>z</sup>: and a traitor, when convicted, is deprived of making any testament or other kind of last will, and if he has made any before, the same by the conviction becomes void in respect of his goods and chattels <sup>a</sup>; so

<sup>x</sup> Law of Test. 51. 4 Burn's Eccles. Law, 53.

<sup>z</sup> Black. Com. 4 V. 381.

<sup>y</sup> Law of Test. 52. 4 Burn's Eccles. Law, 54.

<sup>a</sup> 4 Burn's Eccles. Law, 55.

in respect of real estate after judgment is awarded pursuant to conviction.

FOR PETIT TREASON and FELONY, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and after his death all his lands and tenements in fee-simple (but not those in fee-tail) to the crown, and the king shall have them for a year and a day; and then the lord of the fee shall have them by way of escheat<sup>b</sup>; therefore, when a person is found guilty either of petit treason or felony, and judgment of death is awarded, on which his lands or real estates are forfeited, and his goods and chattels on conviction previous to the judgment, he can make no disposition of either by will or deed; because the law hath then disposed thereof; yet a pardon will restore him to his former estate<sup>c</sup>, as it doth a person attainted of high treason before mentioned.

THERE is a difference between conviction and judgment; conviction is when the offender is found guilty by a jury, on which, or soon after, judgment is awarded against him by the judge, and then he is said by the law to be attainted; but before judgment is awarded the offender is asked if he has any thing to offer why it should not be awarded against him, which he sometimes has, as exceptions to the indictment, and thereby the proceedings against him may happen to be set aside. In many cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; therefore in those cases the forfeiture must be upon conviction or not at all<sup>d</sup>.

LIKEWISE there is this difference between the forfeiture of lands or real estate, and the forfeiture of goods and chattels. The *former* has relation back to the time of the fact committed, so as to avoid all intermediate charges; the *latter* has no relation backward; so that those only which a man hath

<sup>b</sup> Black. Com. 4 V. 385, 386.

<sup>d</sup> Black. Com. 4 V. 375, 387.

<sup>c</sup> 4 Burn's Eccles. Law, 56.

at the time of conviction shall be forfeited : therefore a traitor or felon may *bona fide* sell any of his chattels, real or personal, between the fact and conviction ; yet if they be collusively, and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz. c. 5.) will reach them <sup>e</sup>.

**O**BSTINATELY standing mute on arraignment, where a person is indicted for felony or other crimes, amounts to a confession, and will have the same effect as if the prisoner had been convicted by verdict or confession of his crime <sup>f</sup>.

As the forfeiture of lands or real estates arises only upon attainder, that is, upon the judge's awarding judgment of death or outlawry, a *felo de se*, or person who wilfully kills himself, forfeits no lands of inheritance or freehold, because he never is attainted as a felon <sup>g</sup> ; and therefore if he has made any will of his lands, the same may pass thereby to the devisees ; yet as to his goods and chattels, and the appointment of an executor, his will (if he hath made any) shall be void <sup>h</sup>.

**G**AVELKIND lands, although the ancestor be hanged, are never forfeited for felony, as hath been mentioned in the former part of this work <sup>i</sup>.

**A**N OUTLAWED PERSON is out of the king's protection and out of the aid of the law, and although the outlawry be only for debt, his goods and chattels are forfeited so long as the outlawry subsists <sup>k</sup> ; and if the action on which he was outlawed were not just, yet his goods and chattels are forfeited, because of his contempt in not appearing ; and therefore he cannot make his testament of his goods so forfeited. But a man outlawed for debt, or in a personal action, may in some cases make executors ; for he may have debts upon contract which are not forfeited to the king ; and those executors may have a writ of error to reverse the outlawry <sup>l</sup>.

<sup>e</sup> Black. Com. 4 V. 388.

<sup>f</sup> *Ibid.* 329.

<sup>g</sup> *Ibid.* 386.

<sup>h</sup> 4 Burn's Eccles. Law, 56.

<sup>i</sup> Page 100.

<sup>k</sup> Black. Com. 2 V. 499.

<sup>l</sup> Law of Test. 47. 4 Burn's Eccles. Law, 56.

PAPISTS, till of late years, were under divers disabilities in respect to taking lands either by purchase, descent, or devise <sup>m</sup>; but now, by their complying with the statute 18 Geo. III. c. 60. and taking the oath therein prescribed, those disabilities are removed. — With respect to aliens, it hath already been shewn that those are incapable of holding any real estate <sup>n</sup>.

THUS having taken notice of the persons restrained from making wills, as being under some special prohibition by law or custom; we come now to consider the manner of making the will, whereby both real and personal estate is given or bequeathed, and where the will only concerns personal estate. Who may be made executors, and of whom the testator should beware of appointing. Who may be devisees and take by devise, and the manner of their taking real and personal estate by the will. And here we shall first observe the rules for the construction of wills, and in what manner estates in fee-simple, fee-tail, or for term of life only, may be created; likewise the date of the will, and what is requisite, with respect to the testator's signing thereof, and witnesses subscribing their names thereto.

IT is a rule in the construction of wills, that the same be most favourably expounded, to pursue if possible the will of the testator, who for want of advice or learning may have omitted the legal and proper phrases. And therefore many times the law dispenses with the want of words in devises, which are absolutely requisite in all other instruments; and hereby a fee may be conveyed without the words of inheritance, and an estate-tail without words of procreation<sup>o</sup>, as we shall again see hereafter. But notwithstanding the mind of the testator, if possible, should be pursued, yet it must be so as his intent might stand with the rules of the law and not be repugnant thereunto, it being a rule that the last will of the testator is to be fulfilled according to his true intention, but the spirit of the law is to be preserved<sup>p</sup>; therefore when the testator endeavours to make a settlement of his estate contrary to the reason and policy of the law, the judges will reject it<sup>q</sup>; and herewith agrees what has been mentioned concerning the disposal of estates in such manner as the same

<sup>m</sup> Black. Com. 2 V. 257. 293.

<sup>n</sup> Page 139.

<sup>o</sup> Black. Com. 2 V. 381.

<sup>p</sup> Shep. Touch. 416.

<sup>q</sup> Glib. on Wills, 11.

may not thereby be rendered unalienable after a certain time.

—The intention of the testator must be collected from the will itself, and not from any parol evidence concerning it.

FAYOUR is also shewn with respect to wills in that what the law calls executory devises, which is the limitation of a future interest, not to take place immediately on the death of the testator, but at a time and under circumstances appointed by the will; as when a man devises a future estate to arise upon a contingency, and till that contingency happens does not dispose of the fee-simple, but leaves it to descend to his heir at law; as if one devises land to a feme-sole or unmarried woman and her heirs upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commencing *in futuro*, or at a future time. This limitation, though void in a deed, yet is good in a will by way of executory devise\*. On the subject of executory devises much might be said; but as it is a doctrine that cannot be understood only by such as are well-versed in the law, unless fully explained, I shall here briefly observe, that an executory devise seldom or ever happens, when the will is made with good advice and due consideration; and proceed to shew, that, in respect to real estate, if the testator makes no other disposition thereof than the law would have done had he been silent, the devise will be rejected; as if I give land to my son and his heirs, or to John Syms and his heirs, and my son or John Syms is my heir at law, this devise will be void, and my heir shall take

† Upon the construction of a will, courts of law and equity are very cautious in admitting parol evidence. It has been admitted to ascertain the person where there are two of the same name, or where there has been a mistake in the christian or surname. 2 Atk. 372. Likewise in favour of executors, where the next of kin claimed the undevise surplus; and the ground of its admissibility as to executors is, that it is adduced to rebut a presumption raised against the legal title of the executor (of which mention is made in a subsequent part of our work, p. 184.) 2 P. Will. 159. Note 1. 4 edit. In the case of *Fonnereau and Poyntz*, July 1785, the admission of parol evidence being contended for, it was observed that the court would not admit it to

raise a title or gift; but where the title or gift is raised, and there is a doubt as to the person, or other circumstances, then parol evidence shall be admitted. And here lord Thurlow observing in his discussion, that every evidence, as to the description of the subject the testatrix described, must be admitted; his lordship's opinion was, that he could let in evidence of the value of the estate, not to controul the bequests which the testatrix had made in words themselves distinct, nor to controul a bequest which she had made of a subject she had accurately described; but because the words which she had used in the description were, upon the whole of the contents, uncertain. Bro. Cha. Rep. 472.

\* Black. Com. 2 V. 172.

the land by descent, as his better title; for the descent strengthens his title, by taking away the entry of such as may possibly have right to the estate<sup>1</sup>; whereas, if he claims by devise, he is in by purchase, as heretofore shewn<sup>2</sup>. So, if I devise land to my wife for her life, and after her death the same lands in fee-simple to my son, who is my heir at law, or if I devise it to my executors for a term of years, and after the expiration thereof to my son in fee-simple; in neither of these cases shall he take the land by the will; because, if no such devise had been made, he would have had the land after the death of my wife<sup>3</sup>, or after the expiration of the term of years. But, if I create another estate by my will than would have descended to my heir at law, or where the quality of my estate is altered by the devise, there the disposition of the will shall prevail though it be made to the heir at law; as where a man may have a son and a daughter, and deviseth that his land shall descend to his son, and if he die without issue of his body, that then the same shall go over to the daughter: the son by this devise takes an estate tail, though heir at law to the devisor; because here is an estate tail created by the will, and the heir must take under the will, or the remainder to the daughter would be void. So where a man may have three daughters, his only issue, and deviseth his land to them and their heirs, this devise, though to the heirs at law, is good; because it makes them joint-tenants, in which survivorship takes place, as we have lately seen<sup>4</sup>; whereas, had the daughters taken by descent they had been co-parceners<sup>5</sup>; and the will altering the quality of the estate ought to prevail<sup>6</sup>.

THOSE devises are also void and rejected where the words of the will are so general and uncertain that the testator's meaning cannot be collected from them; therefore, where a man by his will devised by these words, *I give all to my mother*, it was held that the lands did not pass; for the words were too uncertain, and not sufficient to disinherit an heir<sup>7</sup>; it being a rule that the heir at law has a plain and uncontroverted title unless the ancestor disinherits him, and it would be unreasonable to set him aside, unless the intent of the ancestor is evident from the will.

<sup>1</sup> Gilb. on Wills, 112. Law of Test. 153.

<sup>2</sup> Page 69. 89.

<sup>3</sup> Gilb. on Wills, 113. Law of Test. 153.

<sup>4</sup> Page 129.

<sup>5</sup> Mentioned page 88.

<sup>6</sup> Gilb. on Wills, 114. Law of Test. 154.

<sup>7</sup> Gilb. on Wills, 115.

THE words in a will whereby persons may take an estate in fee-simple, fee-tail, or for term of life only, are so various, I shall omit entering into a discussion thereof, and briefly observe, that, in the construction of wills, which are to be so favourably expounded as to pursue if possible the will of the testator, as has just been mentioned, the law many times dispenses with the want of words in devises that are absolutely requisite in all other instruments; wherefore a fee may be conveyed without words of inheritance, and an estate tail without words of procreation. The usual words for conveying a fee-simple, either by deed or will, are, *heirs and assigns for ever*; but by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee hath an estate of inheritance, although the deviser hath omitted the legal words of inheritance<sup>c</sup>. So in respect to an estate tail, the usual words for creating it either by deed or will, are, I give to J. S. (or whoever he may be) *and the heirs of his body*; but in wills an estate tail may be created by a devise to a man and his children<sup>d</sup>, or to a man and his seed, though the word of procreation, *viz. body*, be omitted<sup>e</sup>.

WHERE it is intended a man should have only an estate for life, the usual method, both in deeds and wills, is, to convey the estate by the words, *during the term of his natural life*; and then for preserving contingent remainders, to convey or devise the same to trustees<sup>f</sup>; for with respect to devises, though an express estate for life is given to the ancestor, with a limitation to the heir or heirs of his body, or his issue, yet regularly the ancestor takes an estate tail<sup>g</sup>; and if a devise be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the devisee takes an estate tail<sup>h</sup>, whereby a father, if not prevented, may secure the estate to himself, and deprive his children thereof.

As to the date of the will, no testament being of any effect till after the death of the testator, therefore if there be many testaments, the last overthrows all the former, as we shall again see under a subsequent head<sup>i</sup>; but the republication of a former revokes one of a later date, and establish the

<sup>c</sup> Black. Com. 2 V. 108.

<sup>d</sup> Gilb. on Wills, 33.

<sup>e</sup> Black. Com. 2 V. 115.

<sup>f</sup> As in N<sup>o</sup> 7. Clause 6, Page 240.

<sup>g</sup> 1 Co. Rep. 99.

<sup>h</sup> Burr. Manuf. 1631.

<sup>i</sup> Page 163.

first again. And if there be two clauses in a will so totally repugnant to each other that they cannot stand together, the latter shall be received and the former rejected: wherein it differs from a deed; for there of two such repugnant clauses the former shall stand. Which is owing to the different natures of the two instruments; for the last will and the first deed is always most available in law. Yet in both cases we should rather attempt to reconcile the repugnant clauses<sup>k</sup>.

In making a will where any real estate is intended to pass thereby, due attention must be had to the statute 29 Car. II. c. 3. (commonly called the statute of frauds), which directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence and by his express direction; and be subscribed in his presence by three or four credible witnesses. In the construction of this statute it has been adjudged that the testator's name written with his own hand, at the beginning of his will, as, "I John Mills do make this my last will" and testament," is a sufficient signing, without any name at the bottom; though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times. But they must all sub-

<sup>k</sup> Black. Com. 2 V. 381. 502.—For reconciling repugnant clauses in wills, and where by the same will the same thing has been given to two different persons, there has been much litigation, and various have been the determinations of the courts concerning it. Co. Litt. 112. Note 2. 13 edit. Yet the rule mentioned p. 148. has always been adhered to, and, if possible, the will of the testator pursued; as in very late cases, where two legacies were given to one person by the same will; as where two, each of 1000l. Old South Sea Annuities, were given *simpliciter*, plainly or simply, to the same person by the same instrument, it was presumed the testator intended the legatee should have but one, and decreed accordingly. Brown's Cha. Rep. 30. But where a legacy of 500l. was given by the will, and another of 500l. by a codicil added

thereto, it being inferred that the testator intended the legatee to have both, the same was so determined by the court of chancery. Brown's Cha. Rep. 389. And from these, and other determinations of the court, it is observed, that where two legacies of quantity are given *simpliciter* to the same person by the same instrument, the presumption shall be against their being intended as cumulative; otherwise, where given by different instruments. Yet where both legacies are given for the same cause they shall not be cumulative, whether in the same or different instruments: otherwise where one is given generally and the other for an express cause. And that very slight circumstances have been considered as sufficient to shew the testator's intention either one way or the other. 1 P. Will. 424. Note 1. 4 edit.



scribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument<sup>1</sup>. It has likewise been determined, that a will is good though none of the witnesses saw the testator *actually sign it*, if he owns it before them to be his hand-writing; and it is observable that the statute of frauds does not say the testator shall sign his will in the presence of three witnesses, but requires these three things; first, that the will should be in writing; secondly, that it should be signed by the testator; and thirdly, that it should be subscribed by three witnesses, in the presence of the testator<sup>m</sup>. But it is not necessary that the witnesses should be acquainted with the contents of the will<sup>n</sup>. And, although the statute requires that the witnesses to the will shall subscribe their names in the testator's presence (to prevent obtruding another will in the place of the true one), yet it is sufficient if the testator *might* see, it not being absolutely requisite that he *should* actually see them signing; for, at that rate, if a man should but turn his back, or look off, it might make the will void. And where the testator desired the witnesses to go into another room seven yards distant to attest his will, in which there was a window broken through, whereby he might see them, it was adjudged by the court to be a witnessing in his presence<sup>o</sup>. So, where a will was attested by witnesses in an attorney's office, when the testatrix was in her carriage, where she might see them through the windows thereof and of the attorney's office, it was adjudged to be well attested<sup>p</sup>.

THE witnesses should be entirely disinterested persons, and such as can receive no benefit or advantage by the will, and if there is any freehold estate devised thereby, there must, as has been shewn, be three of them; but, if the will concerns only personal estate, two witnesses will be sufficient, concerning which somewhat more will presently be mentioned. A witness either to the execution of a will or codicil should have no legacy given him thereby, neither should he be a creditor of the testator, especially where, as is often the case, the land devised by the will is made subject to the payment of debts. For by the statute 25 Geo. II. c. 6. all legacies given to witnesses are declared void. And in a case before

<sup>1</sup> Black. Com. 2 V. 377.

Abr. 509. 4 Burn's Eccles. Law, 173.

<sup>m</sup> Case of Stonehouse and Evelyn,

<sup>o</sup> 2 Salk. 688.

<sup>3</sup> P. Will. 254.

<sup>p</sup> Case of Casson and Dade, H. 1781.

<sup>n</sup> Case of Ellis and Smith, 5 Bac. Brown's Cha. Rep. 99.

the court of King's Bench, in Mich. Term, 31 Geo. II. where all the subscribing witnesses were creditors of the testator at the time of executing his will, it was urged that their being creditors of the testator invalidated their testimony, and that notwithstanding their debts were paid them before the time of trial; although the court in this case determined that a benefit given to a subscribing witness should not annul his attestation, if, at or after the testator's death, the witness be disinterested<sup>p</sup>. However, it is safest to have persons for witnesses who are quite disinterested; as here we see legatees thereby lose their legacies: and as to creditors, though their testimony will be admitted on a trial, yet their credit will be then left (like that of all other witnesses) to be considered on a view of all circumstances by the court and jury.

WHERE the will concerns only personal estate, if the same be written in the testator's own hand, though it has neither his name nor his seal to it, nor witnesses present at its publication, it is good; provided sufficient proof can be had that it is the testator's hand-writing. And if written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions, and approved by him, it hath been held good for the personal estate. But it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses<sup>q</sup>. — When the witnesses are omitted, the ordinary, before he grants probate, will require the testator's hand-writing to be proved, or, if another person wrote his will, that the writing or will produced is his will; whereby not only five or six and twenty shillings extraordinary expence will be occasioned even when personal application is made, but perhaps a deal of trouble to the executor in procuring sufficient proof.

WHERE the will only concerns copyhold lands, the same having been surrendered to the use of the will, although the will be not attested by any witnesses, it shall direct the uses of the surrender; for the statute of frauds, which requires the testator's signing in the presence of three witnesses, is confined only to such estates as pass by the statute of wills of the 34 & 35 Hen. VIII. which doth not extend to copyholds, whereon we have treated more fully towards the former part of the preceding chapter.

<sup>p</sup> 4 Burr. Rep. 430.

<sup>q</sup> Black. Com. 2 V. 501.

WITH respect to persons who may be made executors, all persons are capable of being executors that are capable of making wills, and many others besides; as feme-coverts, and infants, nay, even infants unborn, or *in ventre sa mere*, that is, in the mother's womb, may be made executors. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore etate*, or during the minority<sup>r</sup>. Yet, if there be two executors, one whereof is under age, he of full age may solely prove the will<sup>s</sup>.

ALTHOUGH there are very few persons but may be made executors, yet it behoves the testator to beware of whom he appoints executor; for, if a creditor constitutes his debtor his executor, it is a release or discharge of the debt, whether the executor acts or no; provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it will not be allowed against the testator's creditors<sup>t</sup>. If there be several joint debtors, and the creditor makes one of them executor, the debt is extinct in law<sup>u</sup>; and if the husband of a woman that is made executor be indebted to the testator, this making of the wife executor is a release in law<sup>v</sup>. Formerly it was a settled notion, that where there was no residuary legatee appointed by the will, the surplus or *residuum* devolved to the executor's own use, by virtue of the executorship. But now there is this restriction, that, although where the executor has no legacy at all, the residuum shall in general be his own, yet wherever there is a sufficiency on the face of a will (by means of a competent legacy or other-

<sup>r</sup> Black. Com. 2 V. 503.

<sup>s</sup> 1 Lev. 181. mentioned again hereafter, page 193.

<sup>t</sup> Black. Com. 2 V. 512.

<sup>u</sup> Went. Off. Exec. 31, 32.

<sup>v</sup> *Ibid.* 207. As attention should be had with respect to making a debtor executor, so it should be in bequeathing to a creditor, it being an established rule, that a legacy given by a debtor to his creditor which is equal or greater than the debt, shall be presumed to be intended in satisfaction of the debt; yet this rule, although acknowledged to be fully established, being thought a strict rule, in some late cases a dissatisfaction has been expressed with respect to the

principle upon which it proceeds, and the court has been anxious to collect from the will circumstances to rebut the presumption; and where the payment of debts hath been particularly mentioned in the will, the presumption of the testator's intention, that the legacy given should be in satisfaction of the debt, hath been taken away, and the creditor decreed both debt and legacy. 1 P. Will. 410. 3 Atk. 65. So where the legacy hath not been equally beneficial with the debt in some particular (although it may have been more so in another) as in time of payment, or in point of certainty. 1 P. Will. 410. Note 1. 4 edit.

wife) to imply that the testator intended his executor should *not* have the residue, the undevise<sup>d</sup> surplus of the estate shall go to the next of kin; the executor then standing upon exactly the same footing as an administrator, who by the statute 22 & 23 Car. II. c. 10. must make distribution thereof to the intestate's next of kin<sup>x</sup>; and for making this distribution it may be observed that an executor is compellable thereto by the court of chancery<sup>y</sup>; where, of late it has been determined, that, if there be no kindred, the executor shall stand trustee for the crown, to whom the undevise<sup>d</sup> surplus shall go<sup>z</sup>, as in the case of a person dying wholly intestate, mentioned in the former part of this work<sup>a</sup>.—Much litigation having been with respect to executors claiming the undevise<sup>d</sup> surplus, further mention will be made thereof, under a subsequent head<sup>b</sup>.

THERE are very few persons but may be devisees, or legatees, and take either real or personal estate by devise; the latter of which, on the testator's death, vests in the executor, and cannot be taken without his consent<sup>c</sup>, he being the person to answer the testator's creditors; but with the former an executor, as such, has no more concern than an administrator heretofore mentioned<sup>d</sup>; for, on the testator's death, the real estate immediately vests in the devisee, or person to whom it is devise<sup>d</sup>; whereby formerly great inconveniencies arose, as creditors by bond and other specialties were defrauded of their securities, not having a remedy against the devisee of their debtor; to obviate which the statute 3 W. & M. c. 14. was made, and thereby the devise, as against such creditors, is deemed void, and they are enabled to maintain their actions jointly against both the heir and devisee, as has been shewn<sup>e</sup>.

A MARRIED woman, or, as the law terms her, a feme-covert, although she cannot be a grantee to her husband, as a man cannot grant any thing by deed to his wife, or enter into covenant with her; for that would be to suppose her separate existence; but a woman may be attorney for her husband, as that implies no separation; and an husband may bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by death<sup>f</sup>.

<sup>x</sup> Black. Com. 2 V. 514.

<sup>y</sup> Page 63.

<sup>z</sup> Case of Middleton and Spicer, H. 1782. Brown's Cha. Rep. 291.

<sup>a</sup> Page 84.

<sup>b</sup> See page 183.

<sup>c</sup> Black. Com. 2 V. 512.

<sup>d</sup> Page 86.

<sup>e</sup> Co. Litt. 111.

<sup>f</sup> Page 93.

<sup>g</sup> Black. Com. 1 V. 442.

AN infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it, and it is enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born; and if a devise is to children and grandchildren living at the time of the testator's death, a child in the mother's womb might in such case be so far regarded as to be looked upon as living<sup>h</sup>, and will have the same share as any child born before the testator's death. But this must be understood with respect to legitimate children, and not of bastards, heretofore described<sup>i</sup>; for a devise to those in the mother's womb, or before born, is void<sup>k</sup>. Yet, if a bastard is born at the time of making the will, whereby either real or personal estate is given to him, he is capable of taking the same; but it is safe to describe a bastard, in the will, as the natural son or daughter of A. B. [his mother], especially if he be a tender infant, that has not got a name by reputation. — Aliens, we have seen, are not capable of holding lands<sup>l</sup>; and, with respect to some persons incapable of taking a legacy, mention will be made under a subsequent head<sup>m</sup>.

HAVING thus considered those propositions, we shall now proceed to consider the manner of bequeathing to married women and infants, and of appointing guardians: conditions not to trouble executors, and for preventing indiscreet marriages.

WHEN any estate or effects is intended for a married woman, it is generally devised or bequeathed to some person in trust for her, or to be for her sole and separate use, with directions that her receipt alone shall be a sufficient discharge for the same; as thereby to prevent what is given being subject to the husband's control. If any real estate is devised to her in fee-simple, and without any restriction, it immediately vests in her on the testator's death, and will have the same effect as to the husband's curtesy and being conveyed by virtue of a fine, as heretofore shewn<sup>n</sup>. But if any legacy or personal estate is given to a married woman

<sup>h</sup> 4 Burn's Eccles. Law, 146.

<sup>i</sup> Page 84.

<sup>k</sup> Gilb. on Wills, 161.

<sup>l</sup> Page 139.

<sup>m</sup> Page 105.

<sup>n</sup> Page 94—96.

absolutely without any restriction, it will be as if the same were given to the husband, as we shall see under a subsequent head\*. And when any real estate is intended for an infant, it is usual to devise it to some person or persons in trust for him till he attain twenty-one years of age, with directions to the trustees how to manage the same in the interim. So with respect to any legacy or personal estate that may be bequeathed to an infant; for the law will not trust an infant with any real estate; and as to legacies or personal estate, where the testator has not taken necessary care to preserve it for an infant, the courts wherein legacies are to be sued for, when applied to, are not negligent in taking the utmost care for the benefit of infants<sup>p</sup>; the expence of which application may be saved by due care being taken in making the will. Trustees named in the will may also be appointed guardians by any father, who, we have seen, hath power to dispose of the custody of his children<sup>q</sup>; and the same, or such others as the testator shall choose, may be made executors. In default of the father's appointing a guardian, infants at fourteen years of age, whether male or female, may choose their own guardian; and for the personal estate, the ordinary usually assigns him, but for the real estate, it is the province of the lord chancellor to assign a guardian. The power and reciprocal duty of guardian and infant, who is termed in law the ward, during the continuance of the guardianship, are the same as that of father and child; and the infant cannot be sued, but under the protection and joining the name of his guardian, he being to defend him against all attacks, as well by law as otherwise; and when the infant comes of age, must give him an account of all that he hath transacted on his behalf, and answer for all losses occasioned by his wilful delay or negligence. But an infant is allowed to sue either by his guardian or *prochein amy*, that is, his next friend, who may be any person that will undertake his cause<sup>r</sup>; and it frequently happens that an infant institutes a suit in equity against a fraudulent guardian, who, if he hath abused his trust, the court will check and punish, and sometimes proceed to the removal of him, and appoint another in his stead.—To prevent disagreeable contests with young gentlemen, it has become a practice with many guardians, of large estates especially,

\* Page 213.

<sup>p</sup> See page 210, 211, 212.

<sup>q</sup> Page 102.

<sup>r</sup> Co. Litt. 135. Note 1. 13 edit.

to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court<sup>1</sup>.

As to conditions not to trouble executors, if a legacy is given on condition not to dispute the will, and the legatee commences a suit whereby he disputes the validity of the will, this is no forfeiture of the legacy, if there was justifiable cause of contesting it<sup>2</sup>. And even though there is no probable cause, yet where a legatee, or other person interested, hath a right to see the will proved in solemn form<sup>3</sup>, his making use of the right cannot, as it seems, be deemed a disturbance.—The testator gives to B a legacy, on pain of forfeiture of it, in case he should give his wife, whom he made executrix, any trouble in relation to his estate; B brings his bill against the wife, for which there was very little colour, and amongst other things demands his legacy. The chancellor was of opinion that the suit was very frivolous, but would not declare the legacy forfeited<sup>4</sup>. But in a case where a person by his will gave a legacy to his daughter, provided that if she or her husband refused to give release, or should put the executor to any trouble, the same should go over to her sister's children. The daughter and her husband, being within the city of London, sue for her orphanage part. It was decreed that the legacy was forfeited; for however it might have been construed to be only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person, a court of equity could not divest it or call it back again<sup>5</sup>.

GENERALLY, by the ecclesiastical law, all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hinderance to the propagation of the species; and if the condition be, that the legatee marry according to the appointment, arbitrament, or consent of some other person, it is rejected as unlawful<sup>6</sup>. But if the conditions are only

<sup>1</sup> Black. Com. 1 V. 463.

<sup>2</sup> 3 New. Abr. 479.

<sup>3</sup> The manner thereof, see page 187.

<sup>4</sup> Cha. Ca. King, 1.

<sup>5</sup> Case of Cleaver and Spurling.

<sup>6</sup> P. Will. 258.

<sup>7</sup> Godolphin's Orphan's Legacy, 45.

such as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place, or person, then such conditions are not absolutely rejected<sup>a</sup>; as for instance, where the condition is not to marry before the age of twenty-one years: but if it is continued to an unreasonable length of time, it is otherwise. So if the condition be not to marry a particular person, or a widow, or one of any particular place, it is to be performed<sup>a</sup>.

In the temporal courts, the distinction seems generally to have been where the legacy is devised over to another, and where it is not devised over. In the former case it hath been held that the restraint shall be good, so as the legacy shall not be due, unless the condition be performed; but in the latter case, where there is no devise over, it hath been held that the proviso or condition is only *in terrorem*, to make the person careful, but not to defeat the legacy<sup>b</sup>. Yet here there is a distinction between its being charged on real estate and where it is not; as if a legacy be given to a woman upon this condition, that she marry with the consent of a third person, who, as it may be a parent, guardian, trustee, or executor, and the legacy be to be raised out of a real estate; in this case, if she marry without such consent, although there is no devise over, she shall not have it<sup>c</sup>. But if it is a mere personal legacy, payable out of the personal estate, and there be no devise over, in case she marry without such consent, she will be entitled to it, unless there be a devise over; and then it shall go to whom it is so devised, and she will lose it<sup>d</sup>. The reason of this distinction is, because the temporal courts, where the legacy is merely personal, and only a charge on the personal estate, follow the rule of the ecclesiastical courts, which hath jurisdiction as to the personalty; but where it is charged on real estate, of which the ecclesiastical court hath no jurisdiction, they follow the rule of the common law courts; which is similar to what we shall again see hereafter under a subsequent head<sup>e</sup>.

<sup>a</sup> Godolphin, O. L. 45.

<sup>a</sup> *Ibid.*

<sup>b</sup> Cha. Ca. 22. 1 Vern. 20.

<sup>c</sup> Case of Pulling and Reddy, 1 Wilson's Rep. 21.

<sup>d</sup> Case of Reynish and Martin,

3 Atk. 330. Bro. Cha. Rep. 303.

<sup>e</sup> Page 207.

THUS



THUS having proceeded, we come now to the two last propositions under the head of making the will, *viz.* the gift in case of death, and the nuncupative or verbal will.

A GIFT IN CASE OF DEATH, which is called *donatio causa mortis*, is, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered, the possession of any personal goods to another, to be his in case the giver die; but if he lives he is to have them again, as being only given in contemplation of death<sup>c</sup>; and this, notwithstanding there may be a will subsisting, the testator may do, for he might in his lifetime, after making his will, give away any part of his estate, either absolutely or conditionally: and such gift as given in contemplation of death, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors<sup>e</sup>; for being given in case of the donor's death, and in nature of a legacy, it would be fraudulent as against creditors<sup>h</sup>. Under personal goods before mentioned, may be included not only money, plate, and jewels, but also bonds and bills drawn by the deceased upon his banker, the gift whereof after the donor's death hath been held sufficient for receiving the money due thereon<sup>i</sup>.

A NUNCUPATIVE OR VERBAL WILL, is, where the testator, without any writing, doth declare his will before a sufficient number of witnesses, and this can extend only to personal estate; for no real estate can pass by the will, unless it is written and attested in such manner as has lately been shewn. Those verbal wills were formerly more in use than at present, when the art of writing is become more universal; and as they are liable to great impositions, and may occasion many perjuries, the statute 29 Car. II. c. 3. enacts, 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him and approved; and unless the same be proved to have been so done by the oath of three witnesses at the least, who

<sup>c</sup> Black, Com. 2 V. 514.

<sup>e</sup> *Ibid.*

<sup>h</sup> 1 P. Will. 406.

<sup>i</sup> Law of Test. 188. 4 Burn's Eccles. Law, 188.

by the statute of 4 & 5 Ann. c. 16. must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in any wise be good, where the estate bequeathed exceeds 30l; unless proved by three such witnesses present at the making thereof; and unless they or some of them were specially required to bear witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least; except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days; nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow or next of kin to contest it if they think proper.

HENCE we may perceive, that this will extends only to personal estate: That the testamentary words by which it is to be made must be spoken with an intent to bequeath, not any loose idle words in the sick person's illness; for he must require the by-standers to bear witness of such his intention: That it must be made at home, or among his family or friends, unless by unavoidable accident, to prevent impositions from strangers; and it must be in his *last* sickness, for if he recovers he may alter his disposition, and has time to make a written will: That it must not be proved after six months from the making, unless it were put in writing within six days from that time; nor yet too hastily, as not until fourteen days after the testator's death, nor till legal notice hath been given to his widow or next of kin.

THE legislature having thus provided against any frauds in setting up nuncupative wills, by such a numerous train of requisites, that the thing itself is fallen into disuse, and hardly ever heard of, but in the only instance where favour ought to be shewn to it, when the testator is surprised by sudden and violent sickness<sup>k</sup>.

<sup>k</sup> Black. Com. 2 V. 502.

### C H A P. III.

#### *Of revoking the Will.*

**T**HAT a man may alter or make void his will at pleasure, and although he may have made his last will and testament irrevocable in the strongest words, he is at liberty to revoke it<sup>a</sup>, most people seem apprised of; but how a will may be revoked by acts in law and alteration of circumstances, very few persons have any just conception; and as many, after having made their will, have made alterations in their estate, and died without altering or republishing their will, and thereby left their estates and effects open to dispute and litigation; I shall here, after taking notice of the statute 29 Car. II. point out various acts that may be done by a testator, so as to occasion either a total or partial revocation of his will; and then make some observations on the means whereby the revocation might be rectified, and on the nature and effect of a codicil, and the republication of a will; and conclude the head with shewing how, in various cases, a person may die both testate and intestate, and thereby part of his estate be disposed of by himself, and the other part by the law.

By statute 29 Car. II. c. 3. it is enacted that no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tene-

<sup>a</sup> 8 Co. Rep. 82. It is an established rule, that a man's last will overthrows all the former, so that he may make his will to-day, and totally revoke it

by making another to-morrow. But if the last will should be defective it may not prevail for overthrowing the former, concerning which, see p. 168.

ments shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or by his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser signed in the presence of three or four witnesses declaring the same. And that no will in writing concerning any goods, chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only; except the same be in the lifetime of the testator committed to writing, and after the writing thereof read to the testator and allowed by him, and proved to be so done, by three witnesses at the least.

BUT this statute has not taken away revocations of last wills by acts in law; as if the testator should afterwards make a feoffment or conveyance contrary to the will, or any other act inconsistent with it, but such revocations remain as they were before the making this statute<sup>c</sup>; and an alteration of circumstances may be a revocation of a will of personal as well as real estate, notwithstanding this statute, which does not extend to implied revocations<sup>d</sup>; as it hath been held, that, without an express revocation, if a man who hath made his will afterwards marries and has a child, this is a presumptive or implied revocation of his former will which he made in a state of celibacy<sup>e</sup>.—With respect to real estate: By lord chancellor Hardwicke: The general principle is, that, at the time of the devise, the deviser must have a disposing capacity, and an estate in the land devised; and the estate must remain in the same plight and condition until his death; for the least alteration by any act of his makes it a different estate, and shews a different intention, and therefore is an actual revocation. Thus, if one seised in fee devises, then enfeoffs, or conveys it to another to the use of himself in fee; though it is the old use that remains, yet it is a revocation, notwithstanding it is his own feoff-

<sup>c</sup> Carth. 81.

<sup>d</sup> 1 Eq. Cal. Abr. 413.

<sup>e</sup> Gilb. on Wills, 99. Black. Com.

a V. 302.

ment or deed. So of a bargain and sale<sup>f</sup> without inrolment. So if a man think himself tenant in fee, devises, and then, apprehending himself to be only tenant in tail, suffers a recovery with intent to confirm his will, it is a revocation. As to mortgages, they are exceptions out of the rule: at law a mortgage for years, and in equity a mortgage in fee, are revocations *pro tanto*, or for so much only; and the reason is, that a mortgage is only a security, and though it be a conveyance of a real estate, yet in this court it is a chattel interest only, and goes to the executor, and it gives no dower<sup>g</sup>.—Mortgages for terms of years on the death of the mortgagee, the term and the right in equity to receive the mortgage debt, vest in the same person, *viz.* the executor or administrator. But, in cases of mortgages in fee, the estate on the death of the mortgagee goes to the heir or devisee, and the money is payable to his executor or administrator<sup>h</sup>, and must be paid by the heir, if he has the estate, as hath been shewn<sup>i</sup>.—If lands are devised to one in fee, and afterwards mortgaged to the same devisee, it is a revocation *in toto*, or in the whole, being inconsistent with the devise; though if the land be mortgaged to a stranger, it is otherwise<sup>k</sup>; for it hath been admitted to be a settled rule in chancery, that where a testator devises his lands in fee to one, and after mortgages it in fee to another, and then dies before the principal and interest is paid, this is not a *total revocation* of the will, but *quoad* the mortgage only, or as far as the mortgage, and the devisee shall have the equity of redemption<sup>l</sup>.

If a man devises land, and then makes a feoffment or conveyance of it, and afterwards repurchases it, yet the will stands revoked by the feoffment, and the repurchase is no declaration of the testator's mind to set it on foot again<sup>m</sup>.—Although a covenant or articles do not at law revoke a will, yet, if entered into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an

<sup>f</sup> A bargain and sale is a conveyance made by deed, whereby real estate may be conveyed as well as by deed of feoffment, or lease and release, mentioned p. 126. Yet real estate will not pass by bargain and sale, unless the deed be an indenture, and the same be enrolled within six months in one of the courts of Westminster hall, or with the *custos*

*rotulorum* of the county, as directed by statute 27 Hen. VIII. c. 6.

<sup>g</sup> 5 New Abr. 527.

<sup>h</sup> Co. Litt. 205. Note 1. 13 edit.

<sup>i</sup> Page 49.

<sup>k</sup> Prec. in Cha. 515.

<sup>l</sup> 1 Salk. 236. 258.

<sup>m</sup> Gilb. on Wills, 101.

equitable revocation of a will or any writing in nature thereof.<sup>a</sup>—If a man devises land to J. S. and afterwards bargains and sells it to another, though this be not inrolled within six months, according to the statute, consequently nothing can pass to the bargainee, yet this is a revocation of the will; because here is a solemn act done, which plainly shews the intention of the testator to countermand the will.<sup>b</sup>

IF a man seised in fee devises to A. B. in fee, or for life, and afterwards makes a lease to C. D. for years, this even at law shall not be a revocation, but during the years; for the testator's intent does not appear further than during the term of years:<sup>c</sup> and, where an husband was possessed of a term for forty years, devised it to his wife, and afterwards leased the same land to another for twenty years, and died; it was held that this lease was no revocation of the whole estate, but only during the twenty years, and that the wife should have the residue by the devise.<sup>d</sup> So; if a man seised of lands devises the same in fee, or for life, and afterwards makes a lease thereof to another for years, it shall not be a revocation but during the years: though, in case a person has devised lands to one and his heirs, and afterwards leases the same to him for a certain term, to commence after the deviser's death, this is a revocation of the whole estate.<sup>e</sup>

WHERE a man was seised of a lease for three lives, which he devised, and afterwards surrendered the old lease and took a new one to himself and his heirs for three lives, it was decreed by lord chancellor King, that this renewal of the lease was a revocation of the will, as to this particular.<sup>f</sup> So, where a testator devised by his will a leasehold estate, which he held under *Magdalen College*, and after the making of his will, before his death renews his lease, by surrendering the old one and taking a new lease; it was determined by the lord chancellor that this was a revocation of the devise.<sup>g</sup> And thus it hath lately been determined where a leasehold estate was specifically given and surrendered by the testator after having made his will.<sup>h</sup>

<sup>a</sup> 2 P. Will. 624.

<sup>b</sup> Gilb. on Wills, 101.

<sup>c</sup> 1 Roll's Abr. 616.

<sup>d</sup> *Ibid.*

<sup>e</sup> *Ibid.*

<sup>f</sup> 3 P. Will. 166, 170.

<sup>g</sup> 2 Atk. 593. 5 New Abr. 527.

<sup>h</sup> Case of Hone and Medcraft, 1783.  
Brown's Cha. Rep. 261.

IN case a fortune be given to a child by the father, subsequent to the making of his will, wherein he had bequeathed her a portion, this shall be taken as a revocation of the legacy and will for so much \*; as where a man by his will gave his four daughters 600l. a-piece, and afterwards married his eldest daughter to the plaintiff, and gave her 700l. portion. After that he makes a codicil, and gives 100l. a-piece to his unmarried daughters, and thereby *ratifies* and *confirms* his will, and dies. The plaintiff preferred his bill for the legacy of 600l. given to his wife by the will. It was held by the master of the rolls, that the portion given by the testator in his lifetime should be intended in satisfaction of the legacy. And it was agreed to be the constant rule of the court of chancery, that where a legacy was given to a child, who afterwards, upon marriage, or otherwise, hath the like or greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent otherwise; and it was said the words of *ratifying* and *confirming* do not alter the case, though they amount to a new publication, being only words of form, and declaring nothing of the testator's intent in this matter<sup>7</sup>.

THUS having shewn how a will, after being made, may be revoked in whole or in part, we come now to make some observation on what might be done for rectifying the revocation; and as under some circumstances this might be effectuated by a codicil, and in some cases by republishing the will, we shall now advert to and treat on those particulars.

A CODICIL is a schedule or supplement to a will, or an addition made by the testator annexed to and to be taken as part of a testament; being for its explanation or alteration, or to make some addition to, or subtraction from the former dispositions of the testator<sup>2</sup>. An executor cannot regularly be appointed by a codicil, yet may be substituted, according to the will of the testator<sup>3</sup>. A man may make divers codicils, and the first is of equal force with the last, if not contradictory to each other; and herein they differ entirely in their nature from wills, for no man can die with two

\* Prec. in Cha. 183.

<sup>7</sup> Case of Irod and Hurst, 2 Freem. Rep. 224.—Where one of two legacies given to the same person, by the same will, may be a revocation, see

page 152. A legacy adeemed by the testator receiving part under a statute of bankruptcy. See page 205.

<sup>2</sup> Godolphin's O.J. p. 1. c. 1. sect. 3.

<sup>3</sup> Swinb. 14.

testaments, because the latter doth always infringe the former, but a man may die with divers codicils, and the latter doth not hinder the former, unless they be contrary<sup>b</sup>.

IN the case of a real estate, a codicil cannot operate unless it be executed according to the statute<sup>c</sup>. It is necessary, when a codicil is added to a will with intent to pass any real estate, to be careful in using words sufficient, whether it be for altering former dispositions, or disposing of estates purchased after the will was made; and for the testator to execute the codicil, in the same manner, and with the same number of witnesses, as is requisite to the executing an original will according to the statute. So, if a will concerns only personal estate, and a codicil is added with intent to make any alteration, subtraction, or addition, care ought to be taken in using words sufficient for the purpose.—Where there is time and opportunity for writing over the will afresh, and thereby to make such alteration as may be necessary, it is much more advisable, and far better, than doing it by codicil; which will not only increase the expence of the probate when the will comes to be proved, but perhaps require as much, if not more nicety in framing than the will itself.

WHERE a man may have by him two or more wills, the latter whereof, as has just been mentioned, overthrows the former; but the republication of a former will revokes one of a latter date, and establishes the first again<sup>d</sup>: so that what was before rendered void, becomes valid by the new

<sup>b</sup> Swinb. 15. That a will may be effectual for conveying land, there are many requisites necessary to be attended to, more than in a will which only concerns personal estate; and as we have hinted in a former chapter (page 150.) with respect to the heir at law; that his title is not to be defeated but by some other certain title; so if there be two inconsistent wills of the same date, neither of which can be proved to be the last executed (unless explained by some subsequent act of the testator), both are void for uncertainty, and will let in the heir. For revoking a former will, it is necessary that the second will should be subsisting and effective at

the time of the testator's death; therefore if it be not executed according to the statute of frauds (mentioned page 152.) it is not effective as to lands or real estate; yet a devise of lands void in respect of the capacity of the devisee to take, shall revoke a former devise; so shall a subsequent grant to a person incapable of taking; so, if the second will be effectively cancelled in the lifetime of the testator, the first will shall operate as if no other had existed; for it is the only will subsisting at the testator's death. 1 P. Will. 344. Note 1. 4 edit.

<sup>c</sup> 1 A.K. 426.

<sup>d</sup> Black, Com. 2 V. 502.



publication; and if there are words contained therein sufficient for passing or conveying such estate as the testator is possessed of at the time of the republication, to the person or persons for whom the same is designed; it may answer the purpose of making a new will; but if the words contained therein are insufficient, it will not be effectual; for the republication makes no alteration in the words of the will, and therefore can have no effect where the words are not sufficient to convey the estate to the person or persons for whom it is designed.—Where the will concerns real estate, it is safe to republish it in a formal manner, as by the testator's taking it in his hand and declaring the same to be his last will, in the presence of three witnesses; and then to make a memorandum thereof in writing at the bottom of the will, or if there should not be room sufficient, then in the margin or on the back thereof, which may be as follows, viz.

WHEREAS I John Mills, the testator named in this will, have republished the same, with an intent thereby to make void all and every other will and wills at any time heretofore by me made, and to confirm and establish this, which I have declared to be my last will and testament, in the presence of John Smith, Alice Smith, and Thomas Jones, who I have desired to subscribe their names as witnesses hereto: and in witness whereof I the said John Mills have hereunto subscribed my name this day of \_\_\_\_\_, in the year of our Lord 17 \_\_\_\_\_.

JOHN MILLS.

Signed by the said John Mills, in the presence of us, who, at his request, and in his presence, have subscribed our names as witnesses to the above republication.

JOHN SMITH.

ALICE SMITH.

THOMAS JONES.

If the will concerns only personal estate, it will not be amiss to use the same formality for republishing it, though more slender evidence will be sufficient for the purpose. —

As

As to bequests and testaments of personal estate, and a devise affecting real estate, there is this distinction. The former will operate upon whatever the testator dies possessed of, whether he had it at the time of making his will or the same was afterwards acquired. The latter will operate only upon such real estates as were the testator's at the time of executing and publishing his will; wherefore no real estate purchased afterwards will pass under such devise, unless subsequent to the purchase or contract the deviser republishes his will. So here, if a man having made his will, and thereby devised the whole of his estate and effects, and afterwards purchases any real estate, and dies, without either republishing, or altering and re-executing his will, as directed by the statute heretofore often mentioned, he may die both testate and intestate, and his personal estate may be disposed of by himself, and his after-purchased real estate by the law, or will descend to his heir at law: which circumstance now leads us to shew, as was proposed, how in various cases a man may die both testate and intestate, and thereby part of his estate be disposed of by himself, and the other part by the law.

THOSE cases will be readily perceived if we advert to what has been treated on under this and the next preceding head; as under the head of making the will, it was shewn that, if the testator by his will gives his heir at law no other estate than the law entitles him to, he will take by descent and not by the will: so, if there are not words in the will sufficient for disinheriting the heir at law, or if there is a defect in executing the will, as in signing or witnessing it, whereby the same may be rendered invalid as to the real estate; and, if it be not in writing, but only nuncupative or verbal, which may be sufficient for the testator's goods and chattels. In those cases a man having real and personal estate, and having made his will and died, may be said to die both testate and intestate; intestate as to his real estate, which will descend to his heir at law in such manner as heretofore

tofore shewn<sup>e</sup>, and testate as to his personal; for here he may have a will sufficient with respect to his goods and chattels. In like manner a man may die both testate and intestate where he has a will duly signed and witnessed, but has thereby disposed only of part of his real and personal estate, and not mentioned the rest, or devised the residue to any one; in which case part of his real estate will descend to his heir at law, and part of his personal be distributed in such manner as was heretofore shewn<sup>f</sup>; unless it should devolve to the executor under such circumstances as have been mentioned<sup>g</sup>.

UNDER this head of revoking the will; it may be perceived that a man, after having made his will, may die either wholly intestate, or part testate and part intestate; as where he revokes his will; which revocation may arise from a variety of causes, and be either expressed or implied; as if the testator cancels his will by tearing, obliterating, or burning it, which is an express revocation; so where, after having made his will, he marries and has a child; this is held a presumptive or implied revocation; and hereby, as well as by tearing, obliterating, or burning his will, he may die wholly intestate, both as to his real and personal estate. Likewise implied revocations are, where the estate devised is altered after making the will; as in case the testator afterwards conveys the same to another, even though it may be re-conveyed to him, yet the conveying it, is an implied revocation of his will, as to the estate conveyed by him. So if a man possessed of a leasehold estate, and after having devised it surrenders his lease, and takes a new lease of the estate, this is an implied revocation of his will as to this particular, and if he dies before republishing it, he may die both testate and intestate; testate as to that part of his will which is unrevoked, and intestate as to the part revoked; so that one part of his estate may be disposed of by himself, and the other left to the disposition of the law. So it may be in respect to other cases that amount to implied revocations,

<sup>e</sup> Page 86—99.

<sup>g</sup> Page 155.

<sup>f</sup> Page 66.

THERE is another kind of intestacy, which may be where a man may have made his will in writing pursuant to what is required by the statute of 29 Car. II. and thereby devised his real and personal estate, but hath not appointed any executor either expressly, or by words whereby the making of an executor may be implied; and in this case a man may also be said to die both testate and intestate; testate as to his real estate, and intestate as to his personal: yet here the law has no concern with the disposal of either, administration being to be granted with the will annexed, which is to be the administrator's guide in disposing of the personal estate, in like manner as heretofore mentioned<sup>h</sup>; and as to the real estate, an executor, as such, if appointed, has no concern therewith; neither is the appointment of an executor requisite where the will concerns only real estate, and has no concern with goods or chattels, nor ought it in such case to be proved in the spiritual court<sup>i</sup>.

<sup>h</sup> Pag. 2.

<sup>i</sup> Cro. Car. 396.

## C H A P. IV.

*Of proving the Will.*

**U**NDER this head I shall first consider what an executor may do before the will is proved, and the reason why it should be proved : likewise whether it is prudent for the executor to take upon him the executorship, or to refuse it : then just take notice of the will, which concerns both real and personal estate, or personal estate only ; and where and by whom the probate thereof is to be granted ; and proceed to shew how the will may be proved in common form, or form of law, and the end and purpose of proving it either way. For proving it in common form, the power an executor has for compelling the ordinary to grant the probate, and what may obstruct his obtaining the same ; the form of the executor's oath previous to obtaining it, and the expence thereof.—Cases wherein administration must be granted with the will annexed, and the manner of thus granting it.—The method of proving a will in chancery.—That a will is to be registered if it concern real estate, or certain chattels real in the counties of York and Middlesex ; and the manner and form of doing it.—In what courts suits must be brought for proctors fees, and the manner of taxing their bills.

BEFORE letters of administration are issued, an administrator can do nothing, yet an executor may do many acts before he proves the will, as heretofore mentioned<sup>a</sup> : and the reason of this is, that an executor derives his power from the will and not from the probate ; but the administrator owes his entirely to the appointment of the ordinary. An executor, before the will be proved, may seize and take into his hands any of the goods of the testator. He may

<sup>a</sup> Pag. 2.

pay debts, receive debts, make acquittances and releases of debts due to the testator, and take releases and acquittances of debts owing by the testator ; and if before the will be proved, the day occur for payment upon bond made by or to the testator, payment must be made to or by the executor, though no will be proved, upon the like pain of forfeiture as if the will were proved. Also, an executor may, before probate, sell or give away any of the goods or chattels of the testator <sup>b</sup>. And the executor, for goods of the testator taken from him, or a trespass done upon the lease land, or a distraining or impounding of goods or cattle, may maintain, before the will be proved, actions of distress, or replevin, or detinue ; for these actions arise upon the executor's own possession. But before the proving of a will, an executor cannot maintain a suit or action of debt, or the like ; and the reason is, for that therein he must shew forth the will, proved under the seal of the ordinary. And so it seems it must be, if he bring any action for trespass done, or goods taken in the testator's lifetime, so as the testator himself was entitled to the action, and it grows not upon the executor's possession, but upon the executor's own contract for the testator's goods ; as if the executor sell cattle or other goods of the testator's before the will be proved, he may for the money payable maintain an action for debt before he hath proved any will ; and in this, and the action of trespass, there is no necessity of naming him executor <sup>c</sup>. In general, an executor is a complete executor before probate to all purposes but bringing of actions ; so that he may release an action, assent to a legacy, may be sued, may aliene, or otherwise intermeddle with the goods of the testator <sup>d</sup>. For by administering (that is, if one do either pay debts of the testator, or receive debts, or make acquittances for them, or demands the testator's debts as executor, which are acts of administering <sup>e</sup>, as will be more fully shewn hereafter <sup>f</sup>), the executor hath ac-

<sup>b</sup> Went. Off. Exec. 34, 35.

<sup>c</sup> Went. 41.

<sup>e</sup> *Ibid.* 36.

<sup>f</sup> Page 182.

<sup>d</sup> 1 Salk. 301.

cepted and taken upon him the whole administration before the probate ; and is thereby entitled to receive the debts due to the testator ; and all payments made to him are good, and shall not be defeated, although he should die and never prove the will <sup>s</sup>.

THE executor may, in convenient time after the testator's death, enter into the house descended to the heir, for the removing and taking away the goods, so as the door be open, or at least the key be in the door ; and this seems to be understood of the door of each room. For, although the door of entrance into the hall and parlour be open, the executor cannot by that justify the breaking open the door of any chamber to take the goods there ; but only may take those in the rooms which be open. And this seems to be proved by the case of a chest with evidences ; which it is said the executor may take, and put out the deeds, delivering them to the heir, that is to say, the chest being unlocked ; though a chamber or other room within the house locked, is an inclosure of better respect than a chest. — If the goods be not removed within a convenient time, the heir may distrain them as damage feasant <sup>h</sup>, that is, doing damage, or trespassing upon his land <sup>i</sup>. In a case of trespass upon demurrer, which was, lessee for life of a house and pasture land dies, his executors suffer his cattle to go there for six days after his death, and then removed them ; and in trespass justify for that time, averring, that in the time of six days they could not procure any other land or place to put in the cattle ; whereupon it was demurred. And whether that were a convenient time to remove them, was the question. And the court seemed to incline, that six days is but a convenient time for the removing of their cattle ; and the law allows a convenient time for their removing ; especially it being averred they had not any other place to remove them unto. But for a fault in the plea wherein the defendant pleaded a lease of the house, but not of the land, as was mentioned in the declaration, it was adjudged for the plaintiff <sup>k</sup>.

<sup>s</sup> 1 Salk. 306, 307.

<sup>a</sup> Went. Off. Exec. 92.

<sup>i</sup> Black. Com. 3 V. 6.

<sup>k</sup> Cro. Jac. 204.

As the executor may receive debts, release debts, and do other acts before the will be proved; so on the other hand an executor may be sued for debts of the testator before the will be proved; unless he refused the executorship in due manner, so as administration may be granted, and there may be somebody suable for the testator's debts <sup>1</sup>.

By the statute 21 Hen. VIII. c. 5. the ordinary or other person having authority for probate of testaments, may convent before them persons named executors of any testament, to the intent to prove or refuse the same. And if the executors do not appear upon the process, the ordinary may excommunicate them: but they may pray time to advise, and the ordinary may grant in the mean time letters *ad colligendum bona defuncti*; that is, to gather up the goods of the deceased <sup>m</sup>.—Where a will is made and executors named, the ordinary, if he knows thereof, before he commits administration, must send out process against the executors to come in and prove it; and if they do not come, they are to be excommunicate; but if they do come, and if they, nor any of them, will prove; then, by reason of such refusal, the ordinary may commit administration with the will annexed <sup>n</sup>. Refusal must be by some act entered or recorded in the spiritual court, and not verbally or by word, and therefore must be done before some judge spiritual, and not before neighbours in the country; for that is not effectual <sup>o</sup>.—After refusal, and administration committed, the executor cannot go back to prove the will and assume the executorship; but if only upon the executor's making default to come in upon the process to prove the will, the administration be committed, here the executor may at any time after come and prove the will, and so undo the administration <sup>p</sup>.—If a man make an executor, but this is not known, or is concealed, the ordinary may grant administration until the will be proved <sup>q</sup>. And if the

<sup>1</sup> Went. Off. Exec. 36.

<sup>m</sup> Treatise of Eq. 109.

<sup>n</sup> How this administration is committed, see page 194.

<sup>o</sup> Went. Off. Exec. 37. Swiab. 443;

<sup>p</sup> Went. Off. Exec. 39.

<sup>q</sup> 1 Roll's Abr. 907.



person be disabled to be executor, or no executor at all be named in the will, the ordinary may grant administration<sup>r</sup>.

—If administration be granted where there is a will and executors, although the will be concealed, the administration shall be void, if the will be produced and proved, as hath heretofore been shewn<sup>s</sup>.

If there be but one executor, and he do refuse, or being many, and they do all refuse, then is the party dead intestate, and administration is to be committed with the will annexed, as has just been mentioned, and none after can meddle as executors<sup>t</sup>. But where there are divers executors named in the will, and some of them do refuse, and others of them prove the testament; they who refuse may after, at their pleasure, administer notwithstanding such refusal before the ordinary<sup>u</sup>; as in case there be A, B, and C, and A only refuseth, and the will is proved by the others, there A continueth executor, notwithstanding his refusal; for the will being proved, all the executors therein named stand and continue executors, notwithstanding any of their refusal<sup>w</sup>; and at any time during the lives of their companions, they may prove the will, they may pay debts, make releases, and they must be joined in all suits where the co-executors are plaintiffs; because they are all privy to the will; but not where they are defendants; because the plaintiff in the action is not bound by the law to take notice of any but those who have proved the will<sup>x</sup>. When the testament is proved by any of the executors, the refusal of the others before the ordinary is void.

As to bringing of actions in the king's courts, the judges do not admit the executors to sue for things in action, if they

<sup>r</sup> Swinb. 380. For making an executor, it is not always necessary that the word *executor* be expressed; but it is sufficient, if the testator's meaning do appear by other words of like sense or import; as if the testator say, I commit all my goods to the disposition of A. B.; or, I leave all my goods, or the residue of all my goods to A. B. or the like; for in these cases he to whom all

the residue is bequeathed, is thereby understood to be made executor. Swinb. 247.

<sup>s</sup> Page 18. 47.

<sup>t</sup> Went. Off. Exec. 41. 9 Co. Rep. 37. 3 P. Will. 251.

<sup>u</sup> Bacon's Use of the Law, 161.

<sup>w</sup> Went. Off. Exec. 42.

<sup>x</sup> Swinb. 444.

shew not the testament duly proved under the seal of the ordinary; but always the king's courts have used to allow the probate of any of the executors to enable them all to bring actions; so that the probate of the testament doth not give them any interest or title to the things in action or possession, for they have their title and interest by the testament, and not by the probate; and yet without probate the judges will not allow them to bring actions<sup>y</sup> as executors.——Where there be two executors, and one of them proveth the will in the name of them both, against the will of the other; this is not any administration for him who consented not to the probate; but he may plead that he never was executor; for the probate maketh him not executor, if he doth not administer<sup>z</sup>.

If there be two executors made, and one of them refuses before the ordinary, and the other proves the will, and makes a will himself, and appoints an executor, and then die; in this case, it seems the executor of the executor who proved the will alone, shall have the disposition of all the estate, and be executor to the first testator; and the surviving executor shall not intermeddle therewith; for his election by the death of his companion is gone<sup>a</sup>.

If an executor die after he hath proved the will, and hath by his will appointed an executor, in case there was but one executor, this executor also shall be executor to the first testator, as he is to the second; and he shall have all the benefit, and be subject to all the charge, that the first testator had and was subject unto; and yet the goods of one testator shall not be subject to the debts of the other, but each of the testator's goods shall be subject to the payment of his own debts only. And if in this case, the executor of the executor take upon him the administration of the goods of the first testator, he cannot refuse the administration of the goods of the latter; yet he may take upon him the latter,

<sup>y</sup> 9 Co. Rep. 38.

<sup>z</sup> 1 Roll's Abr. 918.

<sup>a</sup> Dyer, 160. Sh:ep. Touch. 445.

<sup>4</sup> edit.

and refuse the former. But if the executor refuse to administer to the first testator before the ordinary, or die before probate of the will, and he hath made a testament, and appointed an executor therein; in this case, it seems the executor of the executor shall not administer the goods of the first testator, but the ordinary must grant administration thereof; unless the *residuum* of the goods, after the debts paid, were given by the will to the first executor<sup>b</sup>.

IN all cases, except of special trust or authority, without the office of executorship, the executor of an executor stands, as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor<sup>c</sup>. But if two be appointed executors, and the one makes his testament, wherein he names his executor, and dies, his co-executor surviving; in this case, the executor of the executor is not to be joined with the executor surviving, neither in the execution of the will, nor in suits or actions. And if the executor of the executor have any goods or chattels in his hands which did belong to the first testator, the executor of the same testator surviving may have an action against the executor of the executor for the same; for the power of the executor who died first was determined by his death, the other then surviving<sup>d</sup>; supposing, in this case, the surviving executor did not refuse in the life of his companion, in manner before mentioned. So, where there are two administrators, and one dies, the administration survives, as heretofore shewn<sup>e</sup>.—Where two executors are made, the one making a will and executors, and dying, if the other die after intestate; the executor of him who first died, shall not be executor to the first testator, as he is dead intestate; because the surviving executor is so dead, and in him the executorship was wholly and solely settled by the death<sup>f</sup> of his fellow before him; and in this case administration of

<sup>b</sup> Shep. Touch. 445. 4 edit.

<sup>c</sup> Went. Off. Exec. 259.

<sup>d</sup> Swinb. 324, 325.

<sup>e</sup> Pag. 6, 21.

goods not administered, or administration *de bonis non administratis*, as it is usually termed, shall be committed <sup>f</sup>.

THE interest vested in the executor may be continued and kept alive by the will of the same executor; so that the executor of A's executor, is to all intents and purposes the executor and representative of A himself; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another, or to commit a new administration, as hath heretofore been mentioned <sup>g</sup>. So that in these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, of the goods of the deceased not administered by the former executor or administrator <sup>h</sup>.

THE probate of the will, as having respect to goods and chattels, is in some respect necessary; but touching any freehold of lands devised, it is not at all material. As to goods and chattels, although the executor before probate, may receive and release debts, he cannot sue for any debts due to the testator <sup>i</sup>, neither can an executor or other person give a will in evidence concerning a personal chattel without producing the probate; for this will is no will, until it has received a sanction or an allowance of it in the spiritual court; for they are to judge whether it be a will or not;

<sup>f</sup> Went. Off. Exec. 101.

<sup>g</sup> Page 6.

<sup>h</sup> Black. Com. 2 V. 566.

<sup>i</sup> Co. Litt. 292.

and the temporal courts are not to look upon it as a will till probate be made. And in an action of trover for goods which a testator gave to his sister in his life-time, brought against the executor for them, who would have given in evidence a former will to have shewn that he had no power to give those goods; this was refused, because he ought to have produced the probate <sup>k</sup>.

HENCE we may form an idea of what an executor may do before the will is proved, and hereby, and by what will hereafter be shewn with respect to proving in common form, or form of law, the reasons why it should be proved may be perceived <sup>l</sup>. And now we may consider whether it is prudent for the executor to take upon him the executorship, or to refuse it; and here we may first examine by what means he may make himself liable thereunto, and how far he may meddle with the testator's estate without subjecting himself thereto; and then what profit or advantage may accrue to him, and what detriment or loss he may sustain thereby.

HE that is named executor cannot be compelled to stand to the will and undertake the executorship, unless he hath already meddled with the goods of the testator *as executor*; and whereby he is not only to be compelled to perform the office of an executor, but also if he should refuse, and the ordinary commit administration unto him, this refusal is void, and he shall be charged as executor <sup>m</sup>. So that if the executor named in the testament resolve not to stand to the executorship, but to refuse the same, he should not administer the goods of the deceased as executor; for having once administered *as executor*, he may at any time after be compelled to undergo the burden of an executor, and also may be sued as executor by the creditors of the testator, though

<sup>k</sup> Viner's Abr. Executor, A. 2. 20.    <sup>m</sup> Swinb. 384.

<sup>l</sup> See page 188, 189.

he cannot sue others as executor ; for that he hath not the will under the ordinary's seal.

A PERSON is then said to administer as executor, so as thereby he may be compelled to stand to the executorship, when he performs those acts which are proper to an executor ; as to pay the debts due by the testator, or to receive any debts due unto the testator, or to give acquittances for the same<sup>n</sup>, or demand the testator's debts as executor : all these be full and clear administrations as executor. And if one being sued as executor, take it upon him and plead in bar as executor, this is an administration : The common plea to free himself, and to shew that he is not the party suable for the testator's debt, being, that he neither is executor, nor ever did administer as executor<sup>o</sup>. If a man do those acts which are not proper to an executor, he is not said to have administered as executor, to the effect before mentioned ; as to feed the cattle of the deceased, lest they should perish, or to take into his custody the goods of the deceased, to the end they may be safe from being stolen or purloined, or to dispose of the testator's goods about the funeral ; for these be deeds of charity common to every christian, and not peculiar to an executor. Likewise to make an inventory of the goods of the deceased, is not to administer as an executor, or to deliver to the wife her convenient apparel<sup>p</sup>.

As to the profit or advantage that may accrue to an executor by taking upon him the executorship, we may observe that, although a person hath not meddled with the goods of the testator, and is therefore not compellable, yet, if a legacy be left to him, he may be compelled to stand to the executorship, or else lose his legacy<sup>q</sup>. But, where a creditor constitutes his debtor his executor, it is a release or discharge of the debt, whether the executor acts or no ; provided there be assets sufficient to pay the testator's debts, as has been mentioned<sup>r</sup>.

<sup>n</sup> Swinb. 469.

<sup>q</sup> Gibson, 469.

<sup>o</sup> Went. Off. Exec. 41.

<sup>r</sup> Page 155.

<sup>p</sup> Swinb. 471, 472.

FORMERLY it was a settled notion, if there was no residuary legatee appointed by the will, the surplus or *residuum* devolved to the executor's own use, by virtue of the executorship; but now there is this restriction, that although where the executor has no legacy at all, the *residuum* shall in general be his own; yet, where there is a sufficiency on the face of the will (by means of a competent legacy, or otherwise) to imply that the testator intended his executor should not have the residue, the undivided surplus of the estate shall go to the next of kin; and if there be no kindred, then to the crown\*.

AND where unequal legacies have been given to executors, and the surplus or *residuum* of the testator's estate undisposed of, the same hath been adjudged to devolve to the executors, by virtue of their executorship, upon the principle just mentioned; as that there hath not appeared a sufficiency on the face of the will to imply that the testator's intention was otherwise; and upon this principle the court of chancery determined in favour of the executors, in the case of *Bowker and Hunter* lately before the court, and which was as follows: *Frances Bayley* being possessed of a considerable personal estate, 31st January 1777, made her will, and thereby gave to *Thomas Vickars Hunter*, gent. the sum of 200l. and, after a great many legacies to a variety of persons, among whom were some of her next of kin; she gave the Rev. *James Eaton* the sum of 50l. and after some charitable legacies, she appointed the said *Thomas Vickars Hunter* and *James Eaton*, executors; but made no disposition of the residue. The executors having proved the will, the next of kin filed a bill in the court of chancery, for an account of the residue of the testatrix's estate, and praying that, the executors having legacies, it might be distributed. The defendants (the executors) admitted assets more than sufficient to pay debts, legacies, and funeral expences; but insisted they had a right to the personal estate, there being nothing inconsistent with such right in the will, or indicative of a contrary intention; the legacies not being given to them as executors, but by their proper names, and there being a great inequality between them, by which the testatrix shewed she meant to

\* Men. i. ned in page 155, 156.

dispose of the whole, and not to die intestate as to any part thereof.—This cause being argued, and a variety of cases cited by the counsel on each side. By the lord chancellor in his discussion thereof: Here the testator's intention is declared in more slender words than in any of the other cases. When the testator gives the executor part by express words, and in the same manner as he appoints him executor, it shews his intention to be different from that expressed by the fact of making him executor.—In order to make a gift of part a bar to taking the residue, the general gift must make the intent as clear as the other intention is from making him executor; where it will bear another intent, it will not bar him from taking the residue. The fundamental distinction is established by laying it down that the rule, *that the executor shall take the residue*, must prevail, unless there is an irresistible inference to the contrary. If the gift of the legacy is qualified, it is sufficient to prevent its barring the residue, or if it may be given for a different purpose. The gift of unequal legacies may have a different ground from the gift of the whole; it may in many events be different: for instance, if 100l. be given to one, and 50l. to the other, it may be different, in case of deficiency, from giving the one 50l. the other nothing. The implication is, that the testatrix must have had a different intent, and that must rebut the equity; and therefore the bill must be dismissed<sup>t</sup>; whereby the executors have the residue; and upon a re-hearing of this cause before the lords commissioners the lord chancellor's decree was affirmed.

UPON the whole which hath been mentioned in regard of executors taking the residue, we may observe that, by law the appointment of an executor vests in him all the personal estate of the testator not otherwise disposed of; but wherever courts of equity have seen on the face of the will sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus in case of a complete intestacy, *i. e.* the next of kin; as where the executors are expressly called executors *in trust*, or where any other expression occur, shewing the office only to be intended them and not the beneficial interest. And a pecuniary legacy given to a sole executor, affords sufficient argument to exclude him from the residue; and so *equal pecuniary* legacies to two or more shall exclude them. But

<sup>t</sup> Case of Bowker and Hunter, 1783. Brown's Cha. Rep. 328.



wherever the legacy is *consistent* with the intent that the executor should take the whole, a court of equity will not disturb his legal right. And a legacy to one only or two or more executors shall exclude neither from the surplus, because the testator might intend to such one a preference; the same rule and reason hold, where several executors have unequal *pecuniary* legacies<sup>u</sup>, as in the abovementioned case. The admission of parol evidence in cases of this kind we took notice of in a former chapter, p. 149.

WHERE a church becomes void, soon after the testator's death, as if A, patron of the church of D, grant to B the next avoidance, the church becomes void, A dies before he presents, his executor presents, and hath the benefit of preferring his son or friend; and this shall not make assets in his hands for payment of debts, for that he could not lawfully take money to present<sup>x</sup>.—By what has been mentioned towards the beginning of this chapter, and under the second section of the second chapter of the law's disposal, the power an executor has by virtue of his executorship may be perceived; and in the next ensuing section the particulars of what he is interested in<sup>y</sup>. And, under a subsequent head, we shall treat on the time an executor has for paying legacies, and the interest that may be payable for the same<sup>z</sup>.

AND here we may observe that the executor shall be allowed all reasonable expences, as well in law-suits, as for other honest purposes; and this reasonableness of expences to be such, as that he may receive thereby neither profit nor loss. And that one executor shall not be charged with the wrong or devastavit of his companion, and shall be no farther liable than for the assets that came to his hands; and therefore where an action was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets, to the amount of 6000l. and died, and that only 16l. came to the hands of the two others; the court held that they should be charged for no more than the 16l. for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the

<sup>u</sup> 1 P. Will. 550. Note 1. 4 edit.

<sup>x</sup> Went. Off. Exec. 73.

<sup>y</sup> Page 21. 28.

<sup>z</sup> Page 205. 210.

other executors<sup>a</sup>. And where an executor or administrator puts out money upon a real security, which at that time there was no reason to object to, and afterwards such security proves bad, he shall not be accountable for the loss<sup>b</sup>.

THE danger of an executor's sustaining detriment or loss by taking upon him the executorship, will chiefly arise from the insufficiency of the testator's goods and chattels for satisfying debts and legacies; especially if he is not careful in observing the rules and order for paying the same.

WHEN the testator's goods and chattels are not sufficient to pay his debts and legacies, there are divers ways whereby an executor may endanger his own estate and subject the same to answer damages; as, 1. When he bestows more upon the funeral of the deceased than is meet, and for which a very small sum seems to be allowed against creditors, as we have heretofore seen<sup>c</sup>: 2. When he pays legacies in money, or assents to legacies before the debts are paid, and hath not enough besides to pay the debts: 3. When he doth not pay the debts in that order and manner as herein before shewn<sup>d</sup>, but pays them first that he should pay last, and he hath not enough to pay them all: 4. When he doth release a debt or duty due to the deceased before he receives it; or, when the goods of the deceased being taken from him, he releases to him that takes them the action whereby he might have recovered them: 5. When he sells the goods of the deceased much under value, especially if it be with covin; as, to his near friends, to his own use, to have money under hand, or the like; but otherwise to sell them under value, especially when he cannot conveniently make more of them, is no waste. All those, and such like acts as these, are said to be a waste in an executor or administrator; and being discovered against him by return of the sheriff, it will produce this effect, to make the executor or administrator chargeable for so much as he hath misemployed and wasted *de bonis propriis*, i. e. of his own pro-

<sup>a</sup> 2 Bac. Abr. 395. The rule at law is, where one executor takes the testator's money, but of his own authority, his companion shall not be charged; but otherwise it is if he by any act, which shews he had it in his power to secure

the money, puts it in the hands of his companion; and herewith the court of chancery agrees, as see in page 187.

<sup>b</sup> 1 P. Will. 141.

<sup>c</sup> Page 51, 52.

<sup>d</sup> Page 51-60.

per goods: so that any creditor may charge him for the debt due to him from the testator, as for his own proper debt, and for so much the execution shall be made against him upon his own body, lands, and goods: and yet so as one executor or administrator shall not be charged for the waste of another; for if there be many executors, and one of them only doth commit the waste, he only shall be punished for the waste<sup>a</sup>. But where two executors join in an acquittance, but only one receives the money, both are chargeable for it as to creditors, who are to have the utmost benefit of the law; but the actual receiver, it is said, is only chargeable as to legatees or persons claiming under distribution<sup>b</sup>.

THIS being premised, the executor may consider the testator's circumstances, and whether it is prudent to take upon him the executorship, or to refuse: and now we may just take notice of the will which concerns both real and personal estate, or personal estate only, and of where, and by whom, the probate thereof is to be granted; and proceed to shew how the will may be proved in common form, or form of law; and the end and purpose of proving it either way. For proving in common form, the power an executor hath for compelling the ordinary to grant the probate, and what may obstruct his obtaining the same; the form of the executor's oath previous to obtaining it; and the expence thereof.

THE will which concerns both real and personal estate ought to be proved in the spiritual court, as in case it concerned personal estate alone<sup>c</sup>; but when it concerns

<sup>a</sup> Shep Touch. 4 edit. 463, 464.

<sup>b</sup> 1 Salk. 318. In the case of *Sadler and Hobbs*, July 1786, the question being, whether an executor having joined in drawing two bills of exchange for 7000l. became thereby answerable to a legatee in respect of that money; although he had never received any part thereof: Lord chancellor Thurlow said, that a creditor shall have a right to charge an executor, and a legatee not, seemed to him an odd distinction; and his lordship held it to be clear, that where by any act or any agreement of

one executor, money gets into the hands of his companion, they shall both be answerable; and from the circumstances of this case, as that the party suffered the money to be out for a very long time (*viz.* 7 years) in the hands of a tradesman, and neglected to call it in, notwithstanding the party interested in the fund was an infant: in such a case as this he is clearly chargeable, *viz.* with a moiety of the 7000l. 2 Bro. Cha. Rep. 114.

<sup>c</sup> Cro. Car. 396.

only real estate, it ought not to be proved in the spiritual court, as before mentioned<sup>d</sup>. Where and before whom the probate of the will is to be granted, having been shewn<sup>e</sup>, we need say no more here concerning it.

THE manner and form of proving testaments is of two sorts; the one is called the vulgar or common form; the other is termed the solemn form, or form of law<sup>f</sup>. If letters testamentary are granted to the party who exhibits the will merely on his oath, by swearing that he believeth it to be the last will of the deceased; this is called proving it in common form<sup>g</sup>: and where there is no controversy or dispute touching the will, there the single oath of the executor alone is sufficient for this purpose<sup>h</sup>. Where the testament is to be proved in form of law, it is requisite that such persons as have interest, as the widow and next of kin to the deceased, to whom the administration of his goods ought to be committed if he had died intestate, be cited, to be present at the probation and approbation of the testament; in whose presence it is to be exhibited to the judge, and petition to be made by the party who prefers the will, and enacted for the receiving, swearing, and examining the witnesses upon the same, and for the publishing or confirming thereof; whereupon witnesses are received and sworn accordingly, and are examined every one of them secretly and severally, not only upon the allegation or articles made by the party producing them, but also upon interrogations ministered by the adverse party, and their depositions committed to writing: afterwards the same are published; and in case the proof be sufficient, the judge, by his sentence or decree, pronounces for the validity of the testament<sup>i</sup>.

THE difference of form in proving the will, works this diversity of effect, *viz.* that the executor of the will proved in the absence of them who have interest, may be compelled to prove the same again in due form of law; and if the witnesses be dead in the mean time, it may endanger the whole testament; especially if 10 years be not passed

<sup>d</sup> Page 172.

<sup>e</sup> Page 6—13.

<sup>f</sup> Swinb. 448.

<sup>g</sup> 2 Nelf. Abr. 1301.

<sup>h</sup> Godolph. 65. If the will is not duly executed, other proof is requisite, as see in the latter part of our explanation.

<sup>i</sup> Swinb. 448, 449.

since the probaton, whereby necessary solemnities are presumed to have been observed: whereas the testament being proved in form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament doth still retain its full force<sup>k</sup>; but it is probable that this word *ten* in figures may have been mistaken for *thirty*; for Dr. Godolphin says, the will being proved only in common form, it may be questioned at any time within thirty years next after, by common opinion, before it work prescription<sup>l</sup>.

THIS proving of the will in solemn form, is commonly at the instance of some person who desireth to invalidate the same; in which case, his proctor, at the time of exhibiting the will, ought to accept the contents thereof so far forth as it maketh for the benefit of his client; otherwise, if any legacy is given to him in the will, he shall lose it for his general impugning the will<sup>m</sup>. If the parties interested do not call the executor to prove the will in solemn form, the executor himself may cause it to be thus proved; and where an executor hath the greatest part of the goods of the deceased bequeathed unto himself, and is in doubt whether, after the witnesses be dead, that the wife or children, or other kindred of the deceased, will contest the validity of the will, he may cite them in special, and all others pretending interest in general (as is the usual practice), to see the will proved by the witnesses; which being done, the will shall not be set aside afterwards (provided there hath been no irregularity in the process), when the witnesses are dead<sup>n</sup>.

WHEN the will is proved either in common form, or in form of law, the original must be deposited in the registry of the ordinary, and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor, together with a certificate of its having been proved before him; all which together is styled the probate<sup>o</sup>.

FOR proving the will in common form, it has just been mentioned<sup>p</sup>, that the single oath of the executor alone is sufficient for this purpose; and if no suit is depending in the

<sup>k</sup> Swinb. 449.

<sup>l</sup> Godolph. 62.

<sup>m</sup> 1 Ought. 21.

<sup>n</sup> 1 Ought. 21.

<sup>o</sup> Black. Com. 2 V. 508.

<sup>p</sup> Page 188.

temporal courts concerning the will, an executor, in case of being refused, may have a writ of mandamus to compel the ordinary to grant probate thereof: but if the validity of the will is contested in the ecclesiastical court, it is a sufficient answer by the ordinary to a writ of mandamus, to return, that a suit is depending before him, and not yet determined<sup>1</sup>. A testator having thought the executor appointed a proper person to be entrusted with his affairs, the ordinary cannot adjudge him disabled or incapable, neither can he insist upon security from the executor, as the testator hath thought him able and qualified<sup>2</sup>: yet if an executor becomes *non compos*, or as it is usually termed, *non compos mentis*, which is, where a person is not of sound mind, memory, and understanding; then the spiritual court may commit administration<sup>3</sup>. If the executor becomes bankrupt, it is said the ordinary cannot grant administration to another<sup>4</sup>: yet the court of chancery, where an executor is considered as a trustee, if he becomes insolvent, will oblige him to give security before he enters upon the trust<sup>5</sup>: so in some cases, after he has taken upon him the executorship, he may be compelled to give security for paying a legacy, as we shall see under a subsequent head<sup>6</sup>.

THE executor's oath, previous to obtaining the probate, is usually in this form: "You shall swear, that you believe  
 " this to be the true last will and testament of A B deceased:  
 " that you will pay all the debts and legacies of the deceased,  
 " as far as the goods shall extend, and the law shall bind you;  
 " and that you will exhibit a true, full, and perfect inventory  
 " of all and every the goods, rights, and credits of the de-  
 " ceased, together with a just and true account, into the re-  
 " gistry of the — court of —, when you shall be law-  
 " fully called thereunto<sup>7</sup>." You also swear, that you believe  
 the whole of the goods, chattels, and credits, of or be-  
 longing to the said A B, at the time of his death, did not  
 in value exceed the sum of 1. "So help you God."

<sup>1</sup> Burr. Mansf. 2295.

<sup>2</sup> 1 Salk. 299.

<sup>3</sup> 2 New Abr. 376.

<sup>4</sup> 1 Salk. 299.

<sup>5</sup> 2 New Abr. 377.

<sup>6</sup> Page 213.

<sup>7</sup> 4 Burn's Ecclef. Law, 202.

BEFORE an executor applies for proving the will, it is advisable for him to make an inventory, and that whether the same is required to be turned in to the ordinary or not; for unless an inventory or a calculation of the value of the deceased's goods, chattels, and credits, be made, the executor cannot be prepared to take the oath required, which has been mentioned with respect to an administrator's oath; and likewise some other reasons why the inventory should be made, and the manner and form of making it shewn <sup>v</sup>. And what was paid as for the fees and expence of proving the will, has been treated on <sup>z</sup>: but in these fees an increase has appeared since the statute 23 Geo. III. yet how far it will be allowed in an executor's or administrator's account, by the temporal courts, cannot be determined, no case having come before either of the courts relative thereto since the statute took effect, as I conceive; wherefore shall omit saying any more concerning it, otherwise than by observing it to be a matter of much less moment than the expence of a suit or contest in the ecclesiastical court; the cost whereof being sometimes very considerable, I shall hereafter, as was proposed, shew in what court suits must be brought for proctor's fees, and the manner of taxing their bills; and at present proceed briefly to point out what the fees and expence of proving wills and taking of administrations now amount to, pursuant to what I have lately learned by a minute enquiry from some of the most eminent practitioners in Doctors Commons; and thereby the reader may perceive what he is to pay for proving the will in common form, and for letters of administration, provided there is no opposition, as heretofore mentioned<sup>a</sup>; and that the will have the names of two witnesses subscribed thereto<sup>b</sup>, and it be very short, as not exceeding three or four sheets, each whereof containing just ninety words. If the will contain more than three or four of those sheets, the expence will be increased about two shillings for every such sheet.

<sup>v</sup> Pag. 37—42. See more concerning making an inventory, page 210.

<sup>z</sup> Page 16, 17.

<sup>a</sup> Page 17.

<sup>b</sup> See the reason of two witnesses, page 154.

THE fees and expences alluded to may be perceived by the following table :

| Where the Value of the Goods, Chattels, and Credits, of a common Seaman, or Soldier, slain or dead in the King's Service, is | In Common Form. |    |    |                       |    |    | By Commission *. |    |    |                       |    |    |
|--|-----------------|----|----|-----------------------|----|----|------------------|----|----|-----------------------|----|----|
|  | Probates.       |    |    | Administra-<br>tions. |    |    | Probates.        |    |    | Administra-<br>tions. |    |    |
|  | L.              | s. | d. | L.                    | s. | d. | L.               | s. | d. | L.                    | s. | d. |
| L. Under 5,  | 0               | 7  | 0  | 0                     | 7  | 0  | 0                | 14 | 0  | 0                     | 14 | 0  |
| 5, and under 20,   | 0               | 7  | 0  | 0                     | 15 | 0  | 0                | 19 | 0  | 1                     | 5  | 0  |
| 20, and under 40,  | 1               | 0  | 6  | 1                     | 8  | 6  | 1                | 16 | 0  | 2                     | 1  | 0  |
| 40, and under 60,  | 1               | 4  | 0  | 1                     | 10 | 6  | 2                | 0  | 0  | 2                     | 5  | 0  |
| With respect to all other Persons where the Value of the Goods, &c. is   |                 |    |    |                       |    |    |                  |    |    |                       |    |    |
| L. Under 5,  | 0               | 8  | 6  | 0                     | 9  | 6  | 0                | 17 | 0  | 0                     | 18 | 0  |
| 5, and under 6,  | 0               | 15 | 6  | 1                     | 2  | 6  | 1                | 13 | 0  | 1                     | 19 | 8  |
| 6, and under 20,   | 1               | 2  | 0  | 1                     | 9  | 6  | 2                | 1  | 0  | 2                     | 8  | 0  |
| 20, and under 40,  |                 |    |    | 2                     | 4  | 0  |                  |    |    | 3                     | 6  | 8  |
| 40, and under 100,   | 2               | 2  | 0  | 2                     | 13 | 6  | 3                | 12 | 10 | 3                     | 18 | 6  |
| 100, and under 300,  | 4               | 12 | 6  | 5                     | 6  | 10 | 6                | 6  | 2  | 6                     | 11 | 10 |
| 300, and under 600,  | 6               | 19 | 2  | 7                     | 13 | 6  | 8                | 12 | 10 | 8                     | 18 | 6  |
| 600, and under 1000,   | 8               | 2  | 6  | 8                     | 16 | 10 | 9                | 16 | 2  | 10                    | 1  | 10 |
| 1000, or upwards,  | 9               | 5  | 10 | 10                    | 0  | 2  | 10               | 19 | 6  | 11                    | 5  | 2  |

HAVING finished our last propositions, we come now to consider in what cases administration must be granted with the will annexed; or, as it is commonly termed, administration *cum testamento annexo*, and the manner of thus granting it.

THIS administration is granted in divers cases where there is a will, as it may be *durante minore etate*; *durante absentia*; or *pendente lite*, and on other occasions which we shall mention. Administration *durante minore etate*, is that which is to be granted during the minority of an infant, who, although he may be appointed executor, cannot ad-

\* The method of obtaining administration, or proving a will by commission, is described towards the end of the explanation preceding the contents of this work.



minister until he arrives at the age of *seventeen*, till which time the ordinary may grant administration with the will annexed, and as it is held to whom he thinks fit<sup>c</sup>; in like manner as where there is no testament, he may grant it till the infant attains his full age<sup>d</sup>: yet if administration is granted during the minority of divers executors, he that comes first of age shall prove the will, and the administration ceases<sup>e</sup>; likewise if there be two executors, one of the age of seventeen, and the other under, administration during the minority of him that is under age is void; because he that is of the age of seventeen may execute the will<sup>f</sup>.

ADMINISTRATION *durante absentia*, or during absence, as when the executor may be beyond sea; this administration seems to stand upon much the same reason as the administration *durante minore ætate*; it being necessary in both cases that there should be some person to manage the estate of the deceased; and therefore it has been held to be grantable by law<sup>g</sup>; and the ordinary may grant it, as he may letters of administration, where there is no will, and the next of kin be beyond sea.

LIKEWISE the ordinary may grant administration *pendente lite*, that is, pending a suit: so, where there is no controversy, he may grant administration until the executor comes in, which, as well as the administration *durante absentia* just mentioned, do fall of course as soon as the consideration ceases upon which they were first granted<sup>h</sup>.

IF the testator makes his will, without naming any executor, or if he names incapable persons, or if the executors named refuse to act; in either of these cases the ordinary must grant administration with the testament annexed, to some other person<sup>i</sup>: and when the administration is thus

<sup>c</sup> Godolph. 102. 5 Co. Rep. 29.  
<sup>g</sup> Mod. 24. 1 New Abr. 381.

<sup>d</sup> Page 5.

<sup>e</sup> Law of Test. 416.

<sup>f</sup> Brownl. 46.

<sup>g</sup> Case of Clare and Hodges, 2 Lutw. 342.

<sup>h</sup> 2 New Abr. 415.

<sup>i</sup> Black. Com. 2 V. 503, 504. See mention heretofore made concerning those points, p. 176, 177.

granted, the duty of the administrator is very little different from that of an executor, he being to adhere to the testament as heretofore mentioned<sup>k</sup>.—For obtaining administration with the will annexed, the will of the deceased must be proved either in common form or form of law<sup>l</sup>, in like manner as was lately shewn with respect to the executor's proving it; and when the will is so proved, the original must be deposited in the registry of the ordinary, and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the administrator, together with a certificate of its having been proved before him<sup>m</sup>; in like manner as when the will is proved by the executor, notwithstanding it is called administration *cum testamento annexo*, or administration with the will annexed.

Thus having proceeded, we come now to treat on the method of proving a will in chancery; and from thence we shall proceed with registering a will.

WHEN real estate is devised by will from the heir at law, and there is no occasion or opportunity to prove or establish the same at law, it is often necessary to prove such will in *chancery*, to perpetuate the testimony thereof: the way to do which, is to exhibit a bill against the heir at law, and to set forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity; and then the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will, or prove their hands if they are dead. The will (if the witnesses are examined in town) must also be left to be examined in the examiner's office; which done, and publication passed, the cause is at an end, an order or rules being first obtained for publication: and the defendant, who is the heir at law, and examines no witnesses touching the validity of the will, may give notice of motion for the plaintiff to pay him his

<sup>k</sup> Page 1, 2.

<sup>m</sup> *Ibid.*

<sup>l</sup> Black. Com. 2 V. 508:

costs to be taxed by a master, which the court usually orders<sup>a</sup>. This is what is usually meant by proving a will in chancery, which might be advisable to do while the witnesses to the will are living; for in this, as well as in other cases where a bill may be filed for perpetuating the testimony of witnesses, it may be that a man's antagonist only waits till the death of some of them to begin his suit, when he may have a more favourable opportunity.

As to registering wills; by several statutes, deeds and wills that affect real estates, and certain chattels real, in the counties of York and Middlesex, are required to be registered; which registering hath no allusion to that in the ecclesiastical courts, but is quite a distinct thing; and it being a matter with which many may be unacquainted, I shall here mention the several statutes by which the same is ordained, and make some observations with respect to effectuating a complete registry.

By the statute 2 & 3 Ann. c. 4. it is enacted, That a memorial of all wills and devises in writing, whereby any honours, manors, lands, tenements, and hereditaments, within the *West-Riding* of the county of York, may be any way affected in law or equity, may, at the election of the party or parties concerned, be registered in such manner as by the said act is directed: and every devise by will of the manors, lands, tenements, or hereditaments, or any part thereof, contained in any memorial so registered as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration; *unless a memorial of such will be registered as aforesaid*. That every such will, or probate of the same, of which such memorial is to be registered, shall be produced to the register at the time of entering such memorial, and oath made that the memorial was duly signed and sealed; and the register shall

<sup>a</sup> 2 Harrison's Cha. Prac, 38.

indorse a certificate on such will or probate thereof, and mention the day, hour, and time on which such memorial is entered, expressing also in what book, page, and number the same is entered; and the register shall sign the certificate so indorsed; which shall be allowed as evidence of such registries in all courts of record. And a memorial of such wills as shall be made or published in London, or in any other place, not within forty miles of the West-Riding, which may affect lands in the West-Riding, shall be registered, in case an affidavit (wherein one of the witnesses to the memorial of such will shall swear, that he saw the memorial signed and sealed, before any one of the judges at *Westminster*, or a master in chancery) be brought with the memorial to the register; which affidavit shall be a sufficient authority to the register to give a certificate of the registering such memorial; and the certificate signed by the register shall be evidence of the registry.—That memorials of wills registered within six months after the death of the deviser dying within *England, Wales, and Berwick*, or within three years after the death of every deviser dying upon or beyond the seas, shall be effectual. And in case the persons interested in the lands devised by reason of the contesting such will, or other inevitable difficulty, without their wilful neglect, shall be disabled to exhibit a memorial within the times limited; in such case the registry of the memorial within six months after their attainment of such will, or a probate thereof, or removal of the impediment, shall be sufficient.

By statute 6 Ann. c. 25. it is enacted, That a memorial and registry shall be made of all wills which affect any lands or tenements in the *East-Riding* of the county of York. And by statute 7 Ann. c. 20. a memorial and registry is to be made of all wills whereby lands are affected in the county of *Middlesex*, in like manner as in the West and East Ridings of Yorkshire. But neither of those three statutes extends to copyhold estates, or to any leases at a rack rent, or to any leases not exceeding twenty-one years, where the  
actual

actual possession goeth along with the lease; and in the statute of 7 Ann. there is a reservation as to the chambers in Serjeant's-inn, the inns of court, and the inns of chancery, to which this act does not extend. By statute 8 Geo. II. c. 6. a registry is to be of all wills affecting lands in the *North-Riding* of the county of York. But this statute does not extend to copyhold estates, or to such leases as just before mentioned.

To effectuate a complete registry, it is necessary that the memorial be on vellum or parchment, which need not be stamped, as neither of the acts require it. The memorial is to contain, 1. The name of the testator and his addition, *viz.* the place of his abode and occupation. 2. The date of the will. 3. The premises, or what is mentioned in the will relative to the real estate or chattels real devised thereby, which are to be described *verbatim* as in the will. 4. The names and additions of the witnesses, *viz.* their several occupations and places of abode.—The memorial must be signed and sealed by one of the devisees, his guardians, or trustees; and then attested by two witnesses who saw the same signed and sealed: afterwards one of the two witnesses goes with the memorial and the will, or the probate, or an office-copy thereof (either of which is sufficient), to the register-office (which for the West-Riding of the county of York, is at Wakefield; for the East-Riding, at Beverley; for the county of Middlesex, in Bell-yard, Carey-street, London; and for the North-Riding, at York); and at the office where the same is to be registered makes an oath (unless an affidavit hath been made before a judge or master in chancery, as before mentioned) that he saw the memorial signed and sealed; and, the oath being so made, he leaves the memorial, together with the will, probate, or office-copy, on which the certificate of the registry is indorsed, as directed by the statute, and that frequently within four or five days after; when the will, probate, or office-copy, is  
O 3
fetched,

fetched, and the register paid his fee for registering. —  
The form of the memorial is as follows :

A MEMORIAL to be registered pursuant to an act of parliament made for registering deeds, &c. within the  
[*West, East, or North Riding of the county of York, or the county of Middlesex, as may be the case*].

THE probate of the last will and testament of A. B. of ——— bearing date the ——— day of ——— and concerning All [*here pursue the words of the will*] which said will is witnessed by C. D. of ——— ; E. F. of ——— ; and G. H. of ——— . And this memorial is required to be registered pursuant to the above mentioned act, by me J. K. one of the devisees in the said will mentioned : AS WITNESS my hand and seal this ——— day of ——— in the year of our Lord 17 .

SIGNED and sealed }  
in the presence of }

JOHN KEMP.

[Place of  
the Seal.]

CHARLES DUN.

LUKE MITTFORD.

FOR registering deeds the form of a memorial varies very little from that used for a will ; but I shall omit mentioning any more here with respect to deeds, as being foreign to this subject, and shall now proceed with what was proposed in respect to proctors fees, and taxing their bills, and therewith conclude this chapter.

IN divers cases it hath been held, that proctors fees are not suable for in the ecclesiastical court, but may be sued for in the temporal courts ; from whence a prohibition may be had to stop proceeding in the ecclesiastical court, if suit should be there commenced <sup>n</sup>. — Upon proper application, as by petition from any suitor, or person that sues, in the ecclesiastical court, the judge thereof has an undoubted right to tax the proctor's bill. The method of doing it, as usually practised, is, for the judge to refer it to the register, directing the respective parties to attend him if they think fit, one to make his

<sup>n</sup> See prohibition described, page 18.

exceptions,

exceptions, and the other to justify the several articles or items of his bill; and the register to make his report to the judge, who thereupon proceeds to tax the bill. If the register has any doubt, the assistance of the other proctors may be required. The fees alledged to be given to counsel, if denied by the client, as also his demand for any unusual or extraordinary articles which do not appear from the proceedings in the cause, must be cleared up to the satisfaction of the judge, either by the proctor's oath (if he voluntarily offers it, and there be no affidavit to the contrary), or by receipts and vouchers from those to whom the money is alledged to be paid, or by producing letters and orders from his client<sup>o</sup>.

## CHAP. V.

*Of Executors, and such Administrators who have the Administration granted with the Will annexed.*

THE office and duty of those administrators who have the administration granted with the will annexed, being, as we have seen in several parts of this work, very little different from that of executors, we shall now take a view of both, as with respect to their power and what they are interested in; their getting in the deceased's effects; and what shall be assets in their hands to make them chargeable; their office and duty in paying debts and legacies. And as to debts, we shall here take notice of such as are barred by the statute of limitations, and of some that are to be paid with interest: and then of legacies; and when the same are to be paid; and what interest shall be allowed thereon. Likewise what executors and administrators are to observe before they pay legacies; and with respect to paying infants and

• 2 Burn's Eccles. Law, 233.

married women. In what courts legacies are to be sued for ; and cases in which security may be required for paying the same ; of legacies and bequests to charitable uses. But as some of those particulars have been discussed in the former part of this work, we shall now have occasion only to take a cursory view thereof, and make a little addition to what has heretofore been mentioned ; but with respect to legacies, which we have hitherto scarce touched upon, those will here require a discussion, as they shall have, after some notice has been taken of the other particulars.

WITH respect to the power an administrator hath by virtue of administration obtained from the ordinary ; this being very nearly allied to that of an executor, except in a few particular instances wherein the executor differs from an administrator, we need here only refer the reader to the first section of the second chapter of the *Law's Disposal*<sup>a</sup> ; and to what has been mentioned under the head of proving the will<sup>b</sup>, for a discovery both of the executor's and administrator's power. And as what the administrator is interested in hath been treated on, and being the same with what an executor, as such, has interest in, we may refer to the second section of the last mentioned chapter<sup>c</sup>, and to what has heretofore been mentioned<sup>d</sup>, for a discovery both of what an executor and administrator is interested in. And as to getting in the deceased's effects, and what shall be assets in the administrator's hands to make him chargeable ; this likewise having been treated on<sup>e</sup>, as well as his office and duty in paying debts<sup>f</sup> ; and being like applicable to an executor, we shall now make some addition to what has been mentioned with respect to assets, as where any real estate is devised for paying debts, and where the same is mortgaged, or charged with the payment of a sum of money at the time, or before it was devised ; that thereby may be seen what an executor or administrator may have for paying the testator's debts and legacies with, besides what has been

<sup>a</sup> Page 20.

<sup>b</sup> Page 173.

<sup>c</sup> Page 28.

<sup>d</sup> Page 155, 156, 165, 173.

<sup>e</sup> Page 43.

<sup>f</sup> Page 51.

mentioned,



mentioned<sup>g</sup>. So likewise, we shall make some addition to what was mentioned with respect to debts, as concerning those that may be barred by the statute of limitations, and debts to be paid with interest.

WHERE any real estate is devised for paying debts, we may observe the general rule is, that the personal estate shall be first charged with the payment of debts and legacies; and the testator cannot exempt it from being liable to his debts, as against creditors; but as between heir and executor, he may charge them upon his real estate, which is not primarily liable, and discharge the personal estate: but, although there are several ways by which a man may give his real estate for payment of his debts, yet if there be not in the will, either express words, or a *manifest* intent of the testator to discharge the personal estate, it shall be first liable<sup>h</sup>. And in all cases it shall be applied in discharge of the testator's personal debt, or general legacy, unless he by express words or manifest intention exempt it<sup>i</sup>.

IF a man devise real estate to be sold by one for payment of his debts and legacies, and make the same person his executor, and die; the money made by such person upon the sale of the estate, shall be assets in his hands, and consequently liable to the payment of the testator's debts and legacies<sup>k</sup>.—Where real estate is devised to one for life, with remainder to another in fee, and the estate is charged with the payment of a sum of money, either by a former devise, rent-charge, or mortgage, the tenant for life shall contribute and pay a proportionable part of such sum<sup>l</sup>; as where the real estate was devised in the manner just mentioned, and being mortgaged for a certain sum, it was decreed that the tenant for life should contribute one-third, and he in remainder two thirds, to redeem<sup>m</sup>; notwithstanding in this case it was observed, that the testator had left assets sufficient to pay the debts; which the remainder-man prayed might go to the payment of the mortgage, as it would, in case the estate had not been devised, but had descended to the heir at law, as

<sup>g</sup> Page 45—50.

<sup>h</sup> 1 Wilson Rep. 24.

<sup>i</sup> Case of Ancafter and Mayer, 1785. Brown's Cha. Rep. 154. 1 P. Will. 294. Note 1. 4 edit.

<sup>k</sup> 1 Roll's Abr. 920.

<sup>l</sup> Case of Hayes and Hayes. 1 Cha. Ca. 223.

<sup>m</sup> Case of Cornish and Mew. 1 Cha. Ca. 271.

heretofore

heretofore shewn in page 93, where we mentioned that personal estate must go in discharge of the real; but if A, seized in fee, mortgages his land, leaving B his son and heir, and B dies leaving C his heir, B's personal estate shall not be applied to pay this mortgage, because it was not B's debt; so though the mortgage being transferred in B's time, B covenants to pay the money, yet the debt not being originally the debt of B his covenant is only a surety, and the land the original debtor, which C shall therefore take with the burthen. And a testator may so exempt his personal estate, as that although a personal debt be secured by mortgage, the real estate shall answer it; and lands subject to, or devised for payment of debts, may be liable to discharge mortgaged lands either descended or devised<sup>a</sup>.

By this it may be perceived, that an executor might have more in his hands for discharging debts, than was mentioned in the former part of this work; and with respect to legacies, which remain to be considered, those claim the next regard; and after the debts are all discharged, must be paid by the executor, so far as his assets will extend: and here he is not allowed to give himself the preference<sup>b</sup> by retaining, as in the case of debts<sup>c</sup>. But before we enter on the discussion of legacies, we shall advert to what was proposed with respect to debts barred by the statute of limitations, and debts to be paid with interest.

By statute 21 Ja. I. c. 16. commonly called the statute of limitations, persons are barred of actions for debts due on simple contract, or for arrears of rent, and of actions that may be had for some other purposes; unless the same be brought within six years after the cause thereof commenced, or after the debts or rent became due: but in this act there are exceptions with respect to infants, persons beyond sea, and some others. And there are means by which the bar of the action may be saved, and the debt revived; as it is clearly

<sup>a</sup> 1 P. Will. 294. Note 1. <sup>2</sup> *Ibid.* 664. Note 1. 4 edit. In the case of *Tweddle and Tweddle*, 1787, where a man purchased an estate subject to a mortgage, and covenanted with the mortgagor to discharge the mortgage, it

was determined that the personal estate should not exonerate the real from payment of the mortgage debt. <sup>2</sup> Bro. Cha. Rep. 101. <sup>3</sup> *Ibid.* 152.

<sup>c</sup> Black. Com. 2 V. 112.

<sup>b</sup> Mentioned page 27.

agreed,

agreed, that if after six years the debtor acknowledges the debt, and promises payment thereof, that this revives it and brings it out of the statute; as if a debtor by promissory note, or simple contract, promises within six years of the action brought, that he will pay the debt; though this was barred by the statute, yet it is revived by the promise, which being proved, an action may be supported for the recovery of it; the acknowledgment and promise being a new evidence of the debt<sup>1</sup>. And if the debtor by his will directs, that all his debts shall be paid, or make any provision for the payment of his debts in general, this will revive it, and bring it out of the statute, and make his executors liable<sup>2</sup>.—Where the debt is considerable, and there is danger of its being barred by the statute, it is common for the creditor within the six years after the same was contracted, to sue out a writ, as by way of commencing an action against the debtor; which writ his attorney gets returned by the sheriff, and then enters it on a roll, which he files with the proper officer; and hereby the debt is saved from being barred by the statute at the expiration of six years, as it otherwise might be.

WITH respect to interest due on debts, of which mention has been made<sup>3</sup>: It seems that where a man *devises* his real estate for payment of his debts, that those due on simple contract, as well as others, shall carry interest, because the real estate, being now the fund out of which the debts are to be paid, yields annual profit<sup>4</sup>. Yet where the real estate is charged only with the payment of debts, lord chancellor Hardwicke seemed to think, that on a general devise of lands, simple contract debts ought not to carry interest<sup>5</sup>.

IN the case of *Newton and Bennet*, H. 1784, where the defendant, as executor, kept the money of his testator in his hands, without accounting for a long time, and employed it in his trade; and being sued by Newton a creditor. The question was, whether he shall pay interest? By the lord chancellor: There are many sayings in the books, to prevent it being laid down as a general

<sup>1</sup> 1 Salk. 28, 29. 5 Mod. 425, 426.

<sup>2</sup> Prec. Cha. 385.

<sup>3</sup> Page 57.

<sup>4</sup> 2 P. Will. 26.

<sup>5</sup> Barnardiston, 230. In the case of *Spirley and Earl Ferrers*, E. 1779, where money was raised by deed upon land, and invested in the name of a

trustee, to pay debts, the residue to the use of the trustee; the simple contract debts were not allowed to bear interest. But if the creditors had filed bills, and obtained separate reports, from that time their debts would have carried interest. Brown's Cha. Rep. 41.

rule, that an executor shall pay interest for money used in the course of his trade; but it does not follow that he may keep the estate of his testator for a long course of time idle, from the persons entitled to it by the will.—The doctrine I am desired to lay down is, that an executor may keep his testator's money, and apply it to the uses of his trade, without being liable to interest.—It has been argued to this extent, that, if the executor is solvent, he shall not pay interest; if he is not, he shall.—I cannot see the reason of that case. It is impossible this should have been laid down as the law of the court. I do not say, he shall pay interest on the ground of his having called in a debt which bore interest, because an executor has an honest discretion to call in money which he thinks in hazard; but when it is called in, and made profit of in the way of his trade, I think he should be charged with interest. The books say, he shall not, because it might be lost, and if it was he must have answered it.—This argument would apply equally to the case, where the executor makes actual interest; for the party to whom it is lent may become insolvent. When the executor did not apply the money to the uses of the will, or bring it hither, I must take it, that he kept it for the purpose of making advantage of it in the way of his trade.—From 1760, *Bennet* had not a colour of reason for not applying it.—He has not shewn any reasonable cause for keeping the money, but has done it merely for the sake of using it in his trade; he therefore must be charged with interest<sup>2</sup>.

IN the case of *Perkins and Baynton*, E. 1784, where the defendant had made interest of money, and the question was, whether he should pay interest, and what interest, for a sum of 868l. which he had received as administrator to his brother, and kept for five years, and from time to time laid it out in government securities? The lord chancellor ordered, that interest should be paid upon the 868l. from 1778, when it came into the defendant's hands, to March 1783, when it was paid into court; and that such interest should be at the rate of four *per cent*<sup>3</sup>.

<sup>2</sup> *Brown's Cha. Rep.* 359.

<sup>3</sup> *Ibid.* 375.

**LEGACIES**, as we have lately hinted, are to be paid after debts; and where there is no time limited for paying a legacy, the executor has one year after the testator's death for paying it<sup>a</sup>, in like manner as heretofore mentioned concerning distribution by the statute<sup>b</sup>.—It is held that the statute of limitations is no bar to a legacy, although it may have been due twenty years before demanded<sup>c</sup>.

A **LEGACY** is a bequest or gift of goods and chattels by will or testament; and the person to whom it is given is styled the legatee, which every person is capable of being, unless particularly disabled by the common law or statutes<sup>d</sup>; as traitors, popish recusants<sup>e</sup>, artificers going out of the kingdom, and exercising their trades in foreign parts<sup>f</sup>: persons for the second offence denying the Trinity, or asserting that there are more gods than one<sup>g</sup>, and some others.

THIS bequest, being of goods and chattels, vests in the executor, as has been mentioned<sup>h</sup>, and the legacy is not perfect without his assent; for if I have a general legacy of 100*l*, or a *specific* one of a piece of plate, or horse, or the like, I cannot in either case take it without the consent of the executor<sup>i</sup>, whose business it is first to see, whether there is a sufficient fund left to pay the debts of the testator, to which the personal estate is always liable, as we have lately shewn<sup>k</sup>. And, in case of a deficiency of assets, all the general legacies shall abate proportionably, in order to pay the debts; but a *specific* legacy is not to abate or allow any thing by way of abatement, unless there are not sufficient without it. . So

<sup>a</sup> 2 Salk. 415.

<sup>b</sup> Page 64.

<sup>c</sup> 2 Freem. Rep. 32.

<sup>d</sup> Black. Com. 2 V. 512.

<sup>e</sup> Defined page 102.

<sup>f</sup> Stat. 5 Geo. I. c. 27.

<sup>g</sup> Stat. 9 & 10 W. c. 32.

<sup>h</sup> Page 156.

<sup>i</sup> Co. Lit. 111. A *specific* legacy (strictly speaking) is said by lord Hardwicke to be a bequest of a particular chattel, specifically described and distinguished from all other things of the same kind, or (in other words) an individual legacy. Money therefore, if sufficiently distinguished, may be the subject of a *specific* bequest, as, money in a certain chest.—So of stock.—So a bequest of part of a *specific* chattel may be equally a *specific* legacy. On

the other hand, a mere bequest of quantity, whether of money or any chattel, is a general legacy, and the purpose to which a general legacy is to be applied will not alter its nature. 1 P. Will. 540. Note 1. 4 edit. In the case of *Ashburner and Maguire*, July, 1786, lord Thurlow made many learned observations on the distinction between *specific* and *general* legacies, and decreed the principal of a bond for 3500*l*. to be a *specific* legacy (notwithstanding the sum was named), and to be deemed *pro tanto*, or wholly, by the testator having received part of it in his life time; as a dividend under the bankruptcy of the obligor. 2 Bro. Cha. Rep. 108.

<sup>k</sup> Page 201.

upon the same principle, if the legatees have been paid their legacies, they are afterwards obliged to refund a ratable part, if debts should come in more than sufficient to exhaust the *residuum*, after the legacies paid<sup>1</sup>.

WHERE any legacy or personal estate is given to one, his executors, administrators, and assigns, or any real estate to one and his heirs (as is common with respect to legacies or personal estate to shew the testator's intention, and so with respect to real estate, to shew what estate the devisee or person to whom the same is devised should have therein); if the legatee or devisee die before the testator, what was given them will be lost, the same as if a legacy, or if real estate should be given to one person absolutely, without any mention of any other person to whom it should go in case of his death; as here on the death of the person to whom the personal estate is given, if he die before the testator, the legacy will undoubtedly be lost or *lapsed*<sup>m</sup>, and sink into the *residuum* of the testator's personal estate; and if wanted for paying debts or other legacies, must be applied by the executor for that purpose; if not wanted, must go to the residuary legatee if any one is appointed; and if no residuary legatee is appointed, then the same shall be disposed of in manner heretofore shewn<sup>n</sup>. And, as to the real estate, it will be as if no devise thereof had been made, and the same will descend to the testator's heir at law. But if the testator by his will gives a legacy, as it may be, of 200*l.* a-piece to his children payable at their several ages of twenty-one years, or days of marriage, and directs that if either die, his or her share shall go to the survivor; here, if either of the children die before the testator, the surviving children shall have the

<sup>1</sup> Black. Com. 2 V. 512.—Legatees on the bequest of part of a specific chattel, though not liable to abatement with general legatees, yet must abate proportionally amongst themselves upon deficiency of specific things bequeathed, or on deficiency of general assets for payment of debts. So, specific legatees of distinct chattels shall abate proportionably on deficiency of general assets. 1 P. Will. 540. Note 1. 4 edit.—Where the residue is not beyond the value of the legacies, the residuary legatee takes nothing. But in a case under special circumstances, where a testator meant

the surplus as a legacy to his son, on a deficiency of assets he was allowed to come in with the other legatees; yet of this case the present lord chancellor has expressed a disapprobation. 1 P. Will. 305, 306. Note 2. 4 edit.

<sup>m</sup> Case of Maybank and Brookes, M. 1780. Brown's Cha. Rep. 84. In this case it was contended for parol evidence to be let in to prove, that the testator knew at the time of making the will, that the legatee was dead; but it could not be admitted.

<sup>n</sup> Page 155, 156.

deceased's share, and the legacy will not be lapsed\*.—When a legacy may be extinguished and gone from the legatee by means of a fortune given after the will was made, may be perceived by what has been mentioned under a preceding head, where we have referred to cases wherein one of two legacies given to the same person, by the same will, may be a revocation of one of them<sup>p</sup>.

If a *contingent* legacy, or legacy depending upon some event that may or may not happen, be left to any one, this may become a *lapsed* legacy, although the legatee survive the testator; as if a man devise to his daughter *root, when she shall be married*, or to his son *when he attains his full age*; or *if he attains the age of twenty-one*, and they die before that time, their legacies are lapsed; but it is otherwise if the devise was to them *to be paid* at their ages of twenty-one<sup>q</sup>; for a legacy to one, to be paid *when he attains the age of twenty-one years*, is a *vested* legacy; an interest which commences *in presenti*, or immediately on the death of the testator, although it be *solvendum in futuro*, or to be paid in future; and if the legatee survive the testator, although he die before that age, his representatives shall receive the legacy out of the testator's personal estate, at the same time it would have become payable if the legatee had lived. This distinction is borrowed from the civil law; and its adoption in the temporal courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable there should be a conformity in their determinations, and that the subject should have the same measure of justice in whatever court he sued. But if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir: for with regard to devises affecting real estate, the ecclesiastical court hath no concurrent jurisdiction<sup>r</sup>.

\* 2 Vern. 207.

<sup>p</sup> See page 167.—Where a legacy given by a debtor to his creditor may be presumed a satisfaction for the debt, see page 155. A legacy adeemed by the testator receiving part under a statute of bankruptcy, see page 205.

<sup>q</sup> Law of Test. 234.

<sup>r</sup> Black. Com. 2 V. 513. To determine the vesting of contingent legacies bequeathed in a variety of forms by different testators, such a number of

facts have been commented and pursued in the court of chancery, even within this last century, it would not only be endless to attempt to enter upon all the particular subtleties and refinements into which this doctrine has been spun out, but likewise inconsistent with the design of this work; we must therefore refer to the adjudications that have been hereon, the modern cases whereof being lately collected in 2 P. Will. 612. Note 1. 4 edit.

As to interest due on *contingent* legacies, and legacies payable to children when they attain twenty-one years. By lord chancellor Hardwicke, in a case before the court of chancery: Those kind of cases, how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the mean time, depend upon particular circumstances; as upon relationship, upon the necessities of legatees, and most of them upon the particular penning of wills; so that there is hardly one case which can be cited that is a precedent for another; and although in these cases some things are certain, as where a legacy is given generally at marriage, or at twenty-one, there the vesting and time of payment are the same, and shall not vest till marriage or twenty-one, being given generally, as when married or attain twenty one, without paid or payable being mentioned; and where a legacy is actually vested, as being given to an infant payable at 21; in either case it shall not carry interest, unless something is said in the will that shews the testator's intention to give interest in the mean time. But those cases are subject to this exception, if it is in the case of a child; then, let a testator give it how he will, either at 21, or at marriage, or payable at twenty-one, or at marriage, and the child has no other provision, the court will give interest by way of maintenance; for they will not presume the father so unnatural as to leave the child destitute\*.

IN the case of *Chaworth and Hooper*, T. 1780, where there was a devise of the residue to an infant payable at 21, with a remainder over, in case of her dying under that age. The question was, Whether, as the infant died under age, the interest, from the death of the testator to that of the infant, should go to the infant's representative, or to the remainder-man, that is, the person to whom devised, in case of the infant's dying under twenty-one? By Mr. baron Eyre, for lord chancellor: The whole residue is here given to the infant; what is to become of the produce? Where

\* Case of *Heath and Perry*, 1744. 3 Atk. 101.



would the use be if it was a specific thing, or the rents if it was land?—The interest is the natural produce. It is not a charge upon any body. The produce must go to the person who has the thing liable to be divested : when divested it must from that moment go to the person who comes in ; and decreed accordingly <sup>a</sup>.

It hath been determined, that where a legacy is devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the first year after the testator's death ; but if the legatee be of full age, he shall only have interest from the time of his demand after the year ; for where no time of payment is set, it is not payable but upon demand, and the legatee shall not have interest but from the time of his demand, except he be an infant, to whom *laches* or negligence is never imputed. But, where a certain legacy is left, payable at a day certain, it must be paid with interest from that day <sup>t</sup>.

WHERE a legacy is given charged on lands or money in the funds, which yield an immediate profit, and there is no day of payment mentioned, the legacy shall carry interest from the testator's death. But where it is charged on the personal estate, which cannot be immediately got in, there the legacy bears interest only from the end of the year after the death of the testator <sup>u</sup>.—If a legacy be brought into court, and the legatee hath notice of it, so that it is his fault not to pray to have it, or that the money should be put out, in such case he shall lose the interest from the time the money was brought into court, unless it be put out by the court, which if it is, the legatee shall have the interest it yields <sup>x</sup>.

BEFORE an executor or administrator pays a legacy, for which he has one year allowed after the testator's death,

<sup>a</sup> Brown's Cha. Rep. 82.

<sup>t</sup> Prec. Cha. 162. 2 Salk. 415.

<sup>u</sup> 2 P. Will. 26, 27.

<sup>x</sup> *Ibid.* 27.

where there is no time limited for paying it, as we have lately seen <sup>y</sup>; he should first observe what debts are unpaid, and how far his assets, or what he has of the testator's estate will extend to pay them; secondly, what general or pecuniary legacies are to be paid, and what he has to pay them with, and whether it will be necessary for any abatement, specific legacies not being to abate if there is enough besides to pay the debts <sup>z</sup>; and herein it behoves the executor to be careful, the rule being, that where an executor pays a legacy, the presumption is, he hath sufficient to pay all legacies, which the court will oblige him if solvent to pay <sup>a</sup>. If the executor hath made an inventory in such manner as heretofore shewn <sup>b</sup>, and there are not effects sufficient to pay all the legacies, it seems, that before he hath paid any legacy he may retain a ratable part or proportionable deduction from the general legacies, in order to pay them proportionably; and herein he cannot prefer himself, as has been mentioned <sup>c</sup>.—On what stamps the executor is to have a discharge for the legacy he pays, hath heretofore been shewn <sup>d</sup>.

WITH respect to paying legacies to infants; in a case where the testatrix gave the bulk of her fortune to her executor upon condition that he paid three several legacies of 100l into the hands of three children, within a year after her death, which the executor accordingly paid; one of the children being then 16 years old, another 14, and the youngest 9. And after this the children brought their bill in chancery against the executor to be paid their legacies, suggesting that the money paid during their infancy had been imbeziled by their father, who was now insolvent, and that this was a fraudulent payment to the father. The executor, in his answer to the bill, denies that he ever knew of this money coming to the father's hands. By lord chancellor Hardwicke: In cases where the legacies have

<sup>y</sup> Page 205.

<sup>z</sup> Mentioned page 205.

<sup>a</sup> 2 Vcz. 194.

<sup>b</sup> Page 37, 38.

<sup>c</sup> Page 202.

<sup>d</sup> Page 64.

been very small, the payment thereof into the hands of minors has been allowed by this court; but in this case, notwithstanding the sum is above 100l, I will not strain the rules of this court to make an executor pay it over again. Yet, after his lordship had looked into the cases, the next day he said that he found this a very doubtful point; and would not determine it without taking time to consider thereon, unless the executor would agree to give the children something; and upon the recommendation of the court, he agrees to give them 50l, to be divided among them, and each side were to abide by their costs; and it was made part of the decree that the 50l was paid by the consent of the parties<sup>e</sup>.

If a legacy, when due, be paid to the father of an infant, it is no good payment, and the executor may be obliged in equity to pay it over again; as where a legacy of 100l was devised to an infant of about ten years of age, and the executor paid it to the father and took his receipt for it; and during fourteen or fifteen years afterwards the son rested satisfied, on the father's promising to give him the legacy; yet at length the father and son being joint traders together, became bankrupts, and this legacy of 100l was, amongst other things, assigned by the commissioners for the benefit of the creditors; whereupon the assignee brought a bill in the court of chancery against the executor for an account and payment thereof. The defendant insisted on the extreme hardship of his case if he should be obliged to pay it over again; and that formerly payment to the father was allowed to be good. But the lord chancellor said, he thought the rule of this court, in not suffering parents to receive their children's legacies, was founded on very good reason; and therefore, to discountenance and deter others from paying such legacies to the parents, he decreed for the plaintiff against the executor<sup>f</sup>. And where a legacy of 125l

<sup>e</sup> Case of Phillips and Paget, 1740.  
2 Atk. 80.

<sup>f</sup> Case of Dayley and Tolferry, 3  
Bacon's Abr. 484.

was given to an infant being but ten years old, and the same was paid to his father, who died insolvent, and of whom the executor had taken a bond to be saved harmless; it was decreed that the executor should pay the legacy over again, for he had paid it at his own peril by taking the bond <sup>g</sup>.

If a legacy be left to an infant under seven years of age, the father, or next of kin, on applying to the spiritual court, are usually assigned curators, and thereby enabled to sue for the legacy; and if the minor is above seven years of age, he is to choose a curator, and request the judge of the court to assign him. But although such curator may be assigned, it is not advisable for the executor to pay the legacy until suit hath been commenced against him; for then he may pay it into the spiritual court if the suit be there commenced, and he be thereunto cited; and thereby he will be discharged <sup>h</sup>. And when suits have been commenced in the court of chancery, by guardians for infants legacies, and executors pursuant thereto have paid the money into court, they have been indemnified against any future claim.

In several cases relative to paying legacies to infants, it hath been observed that, where the legacies were very small, the payment thereof into the hands of infants hath been allowed; and in a cause before the court of exchequer, M. 1727, it was said by the chief baron, that a legacy might be safely paid into the hands of an infant having proper evidence of the payment; as in Wentworth's office of executors <sup>i</sup>, where it is laid down, that if the infant be fourteen years of age, the payment of a legacy to him will stand good, and if the executor have proof of the payment, he is well enough acquitted from any second payment; and it was thought by Mr. Wentworth, that on demand and acquittance tendered, an executor would be safe in paying a legacy to an infant of tender years in the presence of his guardian <sup>k</sup>.

<sup>g</sup> 1 Cha. Ca. 245.

<sup>h</sup> Oughton's *Ordo Judiciorum*, 358.

<sup>i</sup> Bunb. 240.

<sup>k</sup> Went. Off. Exec. 119, 120.

As to paying legacies to married women ; where a legacy of 100*l*, being devised by a father to his daughter, Elizabeth Palmer, a feme covert ; and after the testator's death, his executor pays it to Elizabeth, who spends it in her own maintenance. Her husband sues for it ; and the question was, whether this was a good payment to the wife ? it being in proof that at the time of making the will, Palmer and his wife lived apart, and the husband did not allow her maintenance, and so it is a strong presumption that the deviser intended this for her separate use. By the lord keeper : If it had been so given in express terms, the payment to her had been good ; but as it is, the husband must have it decreed : he said, that in case where a tenant paid his rent to his landlady, not knowing that she was married, yet the husband made him pay it over again, and no help for it.— The will appointing the legacy to be paid within six months after the testator's decease ; the lord keeper likewise decreed the husband interest from that time <sup>1</sup>.

THE spiritual court, and court of chancery, are the courts where legacies are sued for, the latter exercising a concurrent jurisdiction with the former, as incident to some other species of relief prayed by the complainant ; as to compel the executor to account for the testator's effects, or to assent to the legacy, or the like <sup>m</sup> ; and a bill may be filed in the court of exchequer for a legacy.

In some cases an executor may be compelled to give security for paying a legacy ; as where 1000*l* was devised to a person to be paid at the age of twenty-one years ; and upon a bill exhibited against the executor, suggesting a devastavit, and praying that he might give security to pay the legacy when due, it was decreed accordingly <sup>n</sup>. So where the testator devised 800*l* to an infant, to be paid by his executor when the infant should attain the age of twenty-one years, and the infant by his guardian exhibited a bill, that the executor might give security for the payment of the mo-

<sup>1</sup> Case of Palmer and Trevor. 1 Vern.  
261. Law of Test. 250. 4 Burn's  
Ecclesiast. Law, 319.

<sup>m</sup> Black. Com. 3 V. 98.

<sup>n</sup> 1 Cha. Ca. 121.

ney, it was accordingly decreed\*. And if a person possessed of a lease for years, devise that his executors out of the profits thereof, shall pay to every one of his daughters 20l at their full age; the executor may be sued in the spiritual court, to put in security to pay the legacies; and as this being to issue out of a chattel, no prohibition shall be granted†. But where a legacy was given to a grand-daughter to be paid at 21, or marriage; and if she died before either of those contingencies happened, then to go over to another: lord chancellor Hardwicke was of opinion, that as the legacy was devised over, nothing vested in the grand-daughter till one of the contingencies should happen; and therefore she was not intitled to have it secured‡.

WITH respect to legacies and bequests to charitable uses, it has been mentioned, that upon the construction of the statute 9 Geo. II. c. 36, a devise of land to trustees to be turned into money, and the money to be laid out in a charitable use, is not good: likewise, that a devise of a mortgage or term of years, to be laid out in a charity, is void: and if money be given to be laid out in lands, this is expressly within the act; but money given generally is not\*. If money be given to be laid out *in lands or otherwise*, to a charitable use, it hath been determined that such devise is good, by reason of the words [*or otherwise*]. As where a man, in 1738, made his will in these words: “ I will and desire, “ that my executors, within twelve months after my de- “ cease, do settle and secure, by purchase of lands of in- “ heritance, or otherwise, as they shall be advised, out of “ my personal estate, one annuity or yearly payment of “ 50l, to be paid yearly and distributed for ever, by my “ executors, their heirs and assigns, among the poor and “ indigent people of Lecke, in the county of Stafford, in “ such manner as they shall think fit. And my will also is, “ that my executors do settle and secure one other annuity

\* Law of Exec. 187.

† 1 Roll's Abr. 285.

‡ 1 Atk. 509.

§ Page 137, 138.

“ of 5l, to be paid yearly to the vicar of Leeke for the  
 “ time being for ever, for preaching an annual sermon on  
 “ the 12th day of October.” And the testator devised  
 the residue of his personal estate to be equally divided be-  
 tween his sisters, Mrs. Soreby and Mrs. Hollins. By the  
 lord chancellor Hardwicke: The only question in this case  
 is, whether the devise of the two annuities of 50l and 5l to  
 charitable uses, is void by the late statute of mortmain? I  
 am of opinion, upon this act of parliament, that this bequest  
 was not void, and that there is no authority to construe it  
 to be void, if by law it can possibly be made good. The  
 act of parliament is not at all aimed against perpetual cha-  
 rities *merely as such*, or to prevent the establishment or crea-  
 tion of them, but is designed against the cases of perpetual  
 charities *in lands*, and (as the title imports) to restrain the  
 disposition of lands whereby the same become unalienable.  
 The whole recital, and enacting part of the statute, take  
 notice only of the unalienable disposal of land, whereby heirs  
 are disinherited; and therefore the alienation and conveyance  
 of lands to such purposes are prohibited. And although  
 there is a clause to prohibit money being laid out in lands to  
 such purposes as would make them unalienable; yet there is  
 no restriction whatsoever upon any one for leaving a sum of  
 money by will, or any other personal estate to charitable  
 uses, provided it be to be continued as a personalty, and the  
 executors or trustees are not obliged or under a necessity of  
 laying it out in land by virtue of any direction of the testator  
 for that purpose. If a devise in a will is in the disjunctive,  
 and leaves to the executors two methods to do a particular  
 thing by, the one lawful, and the other prohibited by law;  
 can any court say, because one method is unlawful, that  
 therefore the other is so, and the whole bequest void? No;  
 for if one bequest is lawful, that shall be pursued, and  
 take effect. It hath been argued against this devise, that  
 the words [*for ever*] shew the annuities must arise out of

some real estate, which only is capable of supplying them for ever; for personal funds are too perishable and transitory in their nature to answer such everlasting annuities; and if a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity, it may happen the company may be quite dissolved, or the stock may fall, or interest be so reduced, that half the annuity may not be produced. But these objections may be over-ruled. For if the company should be dissolved, the principal stock may be taken out, and vested in some other company. And there may be annuities that may probably continue for ever, and yet not payable out of land. I will mention an instance of one, which has lasted a century and a half, and may exist perpetually; which is, Sir Thomas White's charity, being a disposition of money to be employed by continual rotation in loans to poor tradesmen, of several sums to be let for a settled number of years, and then to be repaid. And any man may, at this day, give by will a perpetual charity in this manner. But if a man by will secures such loans by lands, or purchase of lands; such devise shall be void, and contrary to the late statute of mortmain. After his lordship had discussed another point of argument brought against this devise, as that the words [*heirs and assigns*] did import a purchase in land, or some real thing; he says, I am of opinion, upon the whole, that there is nothing that makes this bequest void in every part; but that it is good in that way which the law does not forbid. But I would not have it questioned, if a man should by his will direct a sum of money to be laid out in land, or upon rent-charge to be secured upon land for any charity, and in the mean time (till it can be laid out) to be invested in government securities for the benefit of the charity, but that such bequest will be void; because the final end and intention of the testator was to dispose of his money in land, and the investiture of it in government and personal securities till a proper purchase of  
land



land or rent-charge offered.—As to the annuity of 5*l*, there are fewer objections to that than to the other: for there is no direction at all for any money or personal estate to be laid out in land; for the executors are only willed to *secure and settle 5*l* a year* for the purpose there mentioned, and it must be secured on a personal fund consistent with the will and intention of the testator, and not contradictory to the words of the act of parliament.—And as it is often said in the old books by the judges, that “I was by at the making of the act of parliament, and the meaning and intention of it was then said to be this or that;” so I was by at the making of this statute, and it was at that very time said by the legislature, that it would not hinder any charitable distribution of a personal estate. Therefore it was decreed that the devise was good; and that the money should be vested in South Sea stock, for the charitable purposes mentioned in the will\*.

MONEY given for erecting an hospital or school, hath been determined not to be within the before-mentioned act of 9 Geo. II. As in the case of *Vaughan and Farrer*, Feb. 1751. John Allen, by his will, gave money to trustees to erect, in some convenient place in or near the city of York, an hospital for the support and maintenance of as many poor old men as the surplus of his effects would admit of, and to put in as many as they should think proper in their discretion. And a bill being brought in the court of chancery for contesting the validity of the testator's will. In the argument for support of this charity, was cited the case of *Gastril and Baker*, 31st March 1747; which was, where the testator's representatives had brought a bill for the residue of the personal estate undisposed of by will, against the trustees, who were also executors, and who claimed it for the charity in the will, in these words: “I give all the rest and residue

\* 2 Burn's Ecclesi. Law, 495.

“ of my estate, of what nature soever, to trustees ; in order  
 “ to, and towards erecting a school for the education of poor  
 “ boys,” in such place, and in such manner, as the trustees  
 should appoint. This was insisted to be a lapsed legacy  
 by the mortmain act, and that erecting a school must mean  
 buying and building. But the lord chancellor held, that  
 erecting included the founding, and consequently the main-  
 tenance of the master ; which was a different thing from the  
 mere school place itself ; but that the end might be obtained  
 by hiring a house. And directed accordingly.—By the  
 lord chancellor Hardwicke : This case comes very near that  
 of the school. For a school imports there should be some  
 place in which the children should be taught ; for it cannot  
 mean that it should be *sub dio*, or in the open air. So doth  
 an hospital import some place in which these people should  
 be entertained. There is no direction in this will, that any  
 part of this money should be laid out in building an hospi-  
 tal ; for *erect* as well imports foundation as building ; and  
 therefore it was so construed in the case of the school ; and  
 so is the word *erigimus* construed in charters of the crown  
 and private foundations. There is nothing in the statute  
 prohibiting giving personal estate to charity, provided it is  
 not to be laid out in land ; and the words of the statute are  
 applied to improvident alienations to disinherison of heirs.  
 If a large personal estate is left to trustees for a charitable  
 use, which they direct, and there is no occasion to come  
 to a court of equity for direction, there is nothing in  
 this statute restraining the trustees from laying out  
 that in land ; because by the express proviso, all *pur-  
 chases* to take place in possession, are good, notwith-  
 standing this act of parliament, which is a matter may  
 perhaps want a remedy. If indeed these trustees were  
 to come to this court for an establishment, I should  
 never direct it to be so laid out in land ; but there is  
 nothing illegal disabling the trustees from privately do-  
 ing

ing it; because the statute makes good all purchases to take effect immediately in possession. It is said, two purposes are to be answered; one, the erecting, the other, the maintenance of the persons; and that supposing the court should take it in the latitude I now do, as to the endowment and provision for the poor, that may be answered by putting it out on the funds, yet the hospital cannot be without a building; that land should be bought for that; and the plaintiff ought to have the benefit of so much as the master<sup>t</sup> should think the value. I wish I could come at that for this plaintiff, who is as much, or more perhaps, an object of charity, than any of these people who may come into this hospital. It is unfortunate; but yet I must go according to such rules as will hold good in other cases. Suppose this happened before the statute, would it have been necessary, any part of this money should be laid out in land to build an hospital? If the trustees had come before the court, and laid a scheme, that a certain person would give a piece of ground to build this upon; or if they had said, there were in *York* several charitable foundations belonging to the city, and they would let them build thereon for this hospital; the court would undoubtedly have accepted it. Nay, they might have said they would take a house in *York* for that purpose: there is nothing in this statute restraining the giving money to build. The act of parliament meant to leave persons to dispose of personal estate for a perpetual charity, but meant to prevent the great mischief of giving land for that, or money to be laid out in land; as that would lock up land from being used in a commercial way, which would be a detriment to the public<sup>u</sup>.

IN the case of the *Attorney General* and *Bowles*, July 24, 1754. William Bowles by his will in 1745, gave to

<sup>t</sup> The master is an officer of the court, and called a master in chancery, of whom there are twelve in number, including the master of the rolls. To those matters are referred to be examined.

<sup>u</sup> 2 Vezey, 182.

trustees

trustees 500l, out of his personal estate, upon trust to lay out part thereof in erecting a small school-house, and a little house adjoining for the master to live in; the whole purchase and building not to exceed 200l; the remaining 300l to be laid out in the purchase of land, or some *real security*, for the maintenance of the master. It was urged that *real security* meant substantial, good, and effectual security, and therefore was not within the statute of 9 Geo. II. But lord chancellor Hardwicke held otherwise, and that he must take the word *real* in the known, legal, signification of it, and could not annex a new idea to it; therefore, the 300l, legacy was void within that statute: but as to the 200l, if they could get a piece of ground by the gift or generosity of any person, not by purchase, they might be at liberty to apply to the court to lay out that 200l in erecting a school-house thereon, but not to be laid out in land to build upon<sup>w</sup>.

IN the case of *Widmore* and the governors of the corporation of Queen Ann's bounty, December 12, 1766, Mr. *Woodroffe* the testator gave 200l to the corporation of Queen Ann's bounty, to augment poor livings; and directed his executors to divide the residue of his personal estate into three parts, and to pay one-third either to the corporation of Queen Ann's bounty, or the society for propagating the gospel; another third to his most necessitous relations, by his father's or mother's side; and the third to *some public charity*. The legacy to the corporation of Queen Ann's bounty being held to be void, as by the rules of that institution, it must be laid out in land; the third of the residue which was given to the same charity, or the society for propagating the gospel, was ordered on the same account to be paid to the latter; and the legacy of the other third to *some public charity*, was declared to be good; but that the executors ought to dispose of it under the eye of the court, and therefore were to propose a charity to the master<sup>x</sup>.

<sup>w</sup> 2 Vezey, 547.<sup>x</sup> Brown's Cha. Rep. 13.

HENCE we may perceive how landed property is guarded from being affected by a devise or bequest to a charitable use ; and yet no restraint is laid on money being devised to such use ; but it is well in a devise thereof to bodies corporate, companies, hospitals, &c. to be accurate in describing them, as the following cases will demonstrate, and likewise further shew the power and benignity of the court of chancery with respect to charitable bequests.

IN the case of the *Attorney General* and *Hickman*, J. S. by his will duly executed, gave his estate to B, his heirs, executors, and administrators ; and by a codicil written by himself and not attested by three witnesses, declared the use to which he would have his estate applied, in the words following : “ I would have the same employed for encouraging such nonconformist ministers as preach God’s word in the place where the people are not able to allow them a sufficient suitable maintenance ; and for the encouraging the bringing up some to the work of the ministry, who are designed to labour in God’s vineyard among the dissenters : the particular method how to dispose of it I prescribe not, but leave it to their discretion, desiring you (meaning B) to take advice of C and D.” B, C, and D, all died before the testator. In this case two questions arose, 1. Whether both the trustees, to whom the disposition and appointment of the said charity was given, dying in the lifetime of the testator, that charity was not gone, and in the nature of a lapsed legacy ? By King lord chancellor : The substance of the charity remains, notwithstanding the death of the trustees before the testator ; and though at law it is a lapsed legacy, yet in equity it is subsisting ; and here is a sufficient certainty of the testator’s intention to revive it. The intention therefore of the party is sufficiently manifest that this charity should continue within 43 Eliz. c. 4. The second question, whether this be a superstitious use within 1 Edw. VI. c. 14. dissenters being such general words as comprehend any persons, however opposite to the church of England.

England. By the lord chancellor: This cannot be a superstitious use within the statute; the dissenters here meant are protestant dissenters acting under the toleration act 1 W. & M. c. 18.: and decreed the *residuum* of the testator's estate to be disposed of to the charity, and ordered a scheme to be laid before him for that purpose<sup>1</sup>.

IN the case of *White and White*, July 28, 1778. Richard Holt, possessed of a considerable personal estate, made his will in 1769; and after giving various legacies, disposed of the *residuum* of his estate in manner following: one half thereof he gave to the *Foundling Hospital*; and if there should be more than one of the latter, then to such of them as his executor should appoint.—He then appointed A. B. of, &c. his executor; but the testator afterwards struck out the executor's name, and appointed no other executor, and died in 1775. *Benjamin White*, the plaintiff, proved the will as a testamentary paper, and took administration with the paper annexed, as one of the next of kin<sup>2</sup>. The defendants are the other next of kin, and the governors of the *Foundling Hospital*, and of the several *Lying-in Hospitals*.—The plaintiff in his bill insists that the devise of the moiety to the *Lying-in Hospital* became void by striking out the name of the executor, who was to appoint, and that it should be referred to the master to report who are entitled as next of kin. The defendants, the next of kin, also claim that moiety as being void. In support of the bill it was argued, that the appointment of the executor being revoked, the devise itself is revoked, their being now no person existing who can appoint; and that the testator having revoked the executor's name, he meant to revoke the devise. For the hospitals, it was argued that the obliteration of the name did not defeat the intent, so as to prevent the money from going to some one or all the lying-in hospitals. That it is impossible it should go as it was left; but the court will stand

<sup>1</sup> 2 Eq. Caf. Abr. 193.

manner as has been described, page 193,

<sup>2</sup> Took the administration in such 194.

in the executor's place. All the rules shew great latitude and liberality of construction, and where the testator refers to any person who cannot act, the court will carry the devise into execution as near as may be. The cases prove, that where money is indefinitely given, the court will exercise its judgment: If the testator had given it to such a charity as the executor should name, the court must have applied it. By the lord chancellor: My notion is, that in the case of charities, this court derives a great latitude of authority from the extensive nature of most charities; because they cannot go upon the same strict rules which prevail in private cases: but that is well resolved into the purpose and the mode. Where the testator is willing it shall go in the largest extent, the court will follow his intent in marking out objects. I wish to pursue this method of construing the intent of testators.—The question is here, whether the legacy is void, the executor's name being struck out, and there being no person upon whom it could devolve, or whether the court will sustain it? It has been argued, that the court has great extent of jurisdiction, in making legacies certain which were before uncertain; and secondly, in applying them where it is not known to what use they were intended. There has been at all times an exercise of this authority, where a legacy has been doubtfully given. Here the testator giving a legacy to the next of kin, and to the executor names a particular charity, a residuary legatee; the question is, only, how the trust shall be carried into execution? I remember to have read a case somewhere, where a legacy is given to B, for the benefit of nonconforming ministers, with the advice of C and D. At the testator's death B, C, and D, were all dead, yet the court sustained the legacy<sup>a</sup>. It must be referred to a master, to which of the lying-in hospitals it shall be paid<sup>b</sup>.

<sup>a</sup> This is the case of the Attorney General and Hickman, mentioned page 221.

<sup>b</sup> Brown's Cha. Rep. 12.





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# A P P E N D I X.

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## I N T R O D U C T I O N

T O T H E

## F O R M S O R P R E C E D E N T S

H E R E L A I D D O W N.

**A** WILL is to be written on paper or parchment without a stamp; and whether it be begun with these words, "In the name of God, amen," or with these, "This is the last will and testament," is immaterial; yet the former seeming to be the most usual method, it is here pursued. The testator should be careful in giving a proper description of himself, as with respect to his christian and surname, his place of abode, trade or occupation; which is usually termed his *addition*. Women, who were never married, use the addition of *spinster*; widows, that of *widows*; which are sufficient without mentioning any trade or business. It is well to insert the usual clause, as, *being in health of body*; or, *being sick in body, but of sound mind*, &c.

WITH respect to legatees, those also should be properly described, as thereby they may be distinguished from any others; and the whole will should be so formed as to leave no room for doubt concerning the testator's intention, and be written in one hand writing, (if possible) without any interlineation or alteration, as mentioned towards the latter part of the explanation preceding the contents of our work; and if any interlineation or alteration should unavoidably happen to be made therein, mention thereof should be made in the attestation, as in No. V. pages 231, 232. The will

should be dated the day and year on which the testator signed it ; concerning which we have made mention in pages 151, 152. And he should put his seal as well as his name to the will ; for although this is not required by the statute of 29 Car. II. even with respect to real estate, and as to personal estate, we have seen in page 154, that less formality is required in executing a will thereof, than a will whereby real estate is affected ; and that two witnesses are sufficient, where the will does not concern real estate : yet if a man derives his power of disposing from any deed, by which it is expressed, that he shall dispose by writing, under his hand and seal, &c. it is necessary for the testator to seal his will ; as by an omission thereof the disposition hath been held void. And it has been held, that sealing a will is not a sufficient signing within the statute ; therefore, it is prudent for the testator both to sign and seal his will in such place, as we shall point out at the conclusion of each of the forms or precedents hereafter laid down, where some further observations will occasionally be made.

## NUMBER I.

**A MAN**, possessed of Money, Plate, Household goods, a Leasehold estate for Years ; another for Years determinable on the Deaths of Three Persons named in the Lease ; and having divers Sums of Money due to him ; but is not possessed of any Real estate, *gives the whole to his Wife.*

IN THE NAME OF GOD, AMEN. I John Stiles, of Cheapside, in the city of London, Linen-draper, being in health of body and of sound mind, memory, and understanding, praised be God for the same, do make this my last will and testament in manner and form following : I give, devise, and bequeath, unto my beloved wife Mary Stiles, all my money, securities for money, goods, chattels, estate and effects, of what nature or kind soever : To HOLD the same unto my said wife, her executors, administrators and assigns. AND I do nominate, constitute, and appoint my said wife sole executrix of this my last will and testament, hereby revoking and making void all and every other will or wills at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof I the said John Stiles  
have

have hereunto set my hand and seal this day of in  
the year of our Lord 17 <sup>a</sup>.

SIGNED, sealed, declared, and published,  
by the abovenamed John Stiles, as and  
for his last will and testament, in the  
presence of us, who, at his request, and  
in his presence, have subscribed our  
names as witnesses thereto <sup>b</sup>.

JOHN STILES.

[Place of  
the Seal.]

THOMAS JONES<sup>c</sup>.

RALPH HICKS.

N U M B E R II.

AN UNMARRIED WOMAN, OF SPINSTER, possessed  
of Money, Household goods, and other Personal  
estate.

1. *Wills to be decently buried in her Parish church.*
2. *Gives 500l to one Brother, 600l to another, and 300l to a Nephew, to be paid when he attains 21 Years of Age; the Interest whereof, in the mean time, to be applied towards his Maintenance and Education.*
3. *Residue to a Brother whom she appoints Executor.*

IN THE NAME OF GOD, AMEN. I Sarah Matthews, of German-street, in the parish of Saint James, in the liberty of Westminster, and county of Middlesex, spinster, being in health of body and of sound mind, memory, and understanding, praised be God for the same, do make this my last will and testament in manner and form following:

1. FIRST, I will and desire that I may be decently buried
2. in the parish church of Saint James aforesaid; AND I give and bequeath unto my brother John Matthews the sum of 500l; ALSO, I give and bequeath unto my brother William Matthews, the sum of 600l<sup>d</sup>: ALSO, I give and bequeath to my nephew William Matthews, son of my brother

<sup>a</sup> Figures are put here for the sake of brevity, and so in the other forms hereafter laid down; yet it is proper to write the whole of the will in words, and that without any contractions.

<sup>b</sup> If the testator makes two parts of his will, as has been mentioned to be sometimes done, p. 126, say, next after the word "thereto," as we have likewise done to a duplicate thereof.

<sup>c</sup> Witnesses should be disinterested persons, as shewn p. 153.

<sup>d</sup> When there is no time limited for paying a legacy, the executor has one year after the testator's death for paying it, as shewn p. 205.

3. Thomas Matthews, deceased, the sum of 300l; to be paid to my said nephew, when he attains twenty-one years of age; and the interest thereof in the mean time to be paid and applied towards his maintenance and education, in such manner as my executor hereinafter named, shall in his discretion think fit. ALL the rest and residue of my money, goods, chattels, estate, and effects, of what nature or kind soever, I give and bequeath unto my brother James Matthews: AND I do nominate, constitute and appoint, my said brother James, sole executor of this my last will and testament; hereby revoking and making void all and every other will and wills at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal, this       day of       in the year of our Lord 17 .

SIGNED, sealed, &c. }  
[as in No. I.] }

SARAH MATTHEWS.

[Place of  
the Seal.]

### N U M B E R III.

A WIDOW, possessed of Goods, and Houses held by Leases for Terms of Years.

1. Gives an House and some Household goods to a Son.
2. Another House to a Daughter.
3. Residue to another Son, and appoints him Executor.

- IN THE NAME OF GOD, AMEN. I Mary Kemp, of the borough of Honiton, in the county of Devon, widow, being sick and weak in body, but of sound mind and memory, praised be God for the same, do make and declare this my last will and testament, in manner and form following:
1. I give, devise, and bequeath unto my son John Kemp, his executors, administrators, and assigns; all that my leasehold dwelling-house, messuage, or tenement, situate and being in the borough of Honiton aforesaid, now in the tenure or occupation of Francis Holland, cabinet maker: AND ALSO, my bureau and book-case with glass doors, my silver quart two-handled cup, marked I. <sup>M</sup>. K. my large mahogany square table, and mahogany pillar and claw table. ALSO, I give, devise, and bequeath unto my daughter Elizabeth Kemp, her executors, administrators, and assigns, all that my leasehold

- hold dwelling-house, messuage, or tenement, situate and being in the parish of Coombrawley, in the said county of Devon, and now in the tenure or occupation of Thomas Jones, butcher. ALL the rest, residue and remainder of my estate and effects, of what nature or kind soever, I give, devise, and bequeath unto my son Thomas Kemp; and I do hereby nominate, constitute, and appoint my said son Thomas sole executor of this my last will and testament\*: IN WITNESS whereof I have hereunto set my hand and seal, this day of in the year of our Lord 17 .

SIGNED, sealed, &c. }  
[as in No. I.] }

MARY KEMP.

[Place of  
the Seal.]

N U M B E R I V.

A MARRIED WOMAN by virtue of a Settlement made previous to her Marriage, disposes of Personal estate.

1. *Mentions her Marriage Settlement.*
2. *Gives 200l to her Husband; 100l to her Brother; and 100l to a Cousin.*

\* The estates being bequeathed in the form they are by this will; if either of the legatees die in the lifetime of the testatrix, the legacy of such will lapse, and if it be either of the legacies given to the first mentioned son or daughter, the same will become the property of the residuary legatee, as shown in page 206. but if he die during the life of the testatrix, and the other two survive her, the residue may accrue to them as her nearest relatives, yet not by virtue of the will. Now this the testatrix might have prevented by bequeathing to the same persons in various other forms; as by limitations treated on p. 135, 136. or by such conditions as she might have thought fit to insert; as for example, suppose just before the words, "In witness" she had added, "Provided always and my will is, that in case my said son John die before me; then I give, devise, and bequeath, what I have hereinbefore bequeathed to him, unto my said daughter Elizabeth; but in case she die before me, and my said son John survive me; then I give, &c. what I have hereinbefore bequeathed to her, unto my said son John; and if my said son Thomas die before me, and my said son John and daughter Elizabeth survive me; then I give, &c. what I have hereinbefore bequeathed to my said son Thomas, unto my said son John and daughter Elizabeth, equally to be divided between them, and do appoint them joint executors of this my will. And if all my said children die before me; then I give, &c. all that is hereinbefore bequeathed to my said children, unto all and every legitimate child or children as shall be begotten and born of their several and respective bodies at the time of my death, equally to be divided, and their several and respective shares paid, assigned, and delivered to them, as they shall severally and respectively attain the age of twenty-one years; and for the purpose of thus providing for my said children's children in case all my said children shall die before me, do appoint my cousins James and William Thompson, joint executors of this my will:" "In witness," &c. [as in the will].

3. *Residue to be equally divided between a Nephew and Niece, if living at Testatrix's Death; if either be dead, deceased's Share to go to the Survivor.*
4. *Appoints her Brother sole Executor.*

IN THE NAME OF GOD, AMEN. I Elizabeth Mills, now wife of John Mills, of the parish of Saint Margaret, Westminster, in the county of Middlesex, Esquire, late Elizabeth Field, spinster, being sick and weak in body, but of sound and disposing mind, memory, and understanding, praised be God for the same, do hereby, in pursuance and exercise of the power and authority given and reserved to me, in and by the settlement made previous to my marriage with the said John Mills, and by force and virtue of all and every the power and powers, authority and authorities in me being, or enabling me thereto<sup>f</sup>, make my last will and testament in manner following, that is to say, I give and bequeath unto my beloved husband the sum of 200l. ALSO, I give and bequeath unto my brother William Field the sum of 100l. ALSO, I give and bequeath unto my cousin Ann Soam widow, the sum of 100l. ALL the rest, residue, and remainder of my estate and effects, of what kind or nature soever which I have or shall have right to dispose of, I give and bequeath unto my nephew and niece, James and Mary Field, equally to be divided between them, in case they are both living at the time of my death; but if either of them shall happen to die before me, then I give and bequeath the share of him or her so dying to the survivor of them.

4. AND I do hereby nominate, constitute, and appoint my brother, William Field aforesaid, sole executor of this my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal the day of in the year of our Lord 17

SIGNED, sealed, &c. }  
[as in No. I.] }

ELIZABETH MILLS.

[Place of  
the Seal.]

<sup>f</sup> It is usual at the beginning of a married woman's will to mention, or as it is properly termed, to recite the substance of the deed of settlement, or bond, if she derives her power of bequeathing from a bond; as the date thereof, the parties thereto, the estate or effects settled or mentioned therein, and the power the wife has thereby for disposing; which is commonly done in the same or like words as are contained in the settlement or bond: yet as it often happens, when a married woman has a desire to make her will, that she cannot immediately have recourse to her deed of settlement or bond (the same being usually lodged in a trustee's hands), I have here laid down this concise method, whereby a married woman may effectually dispose of estate or effects, provided she has sufficient power by virtue of any settlement made previous to her marriage for so doing, see pages 142, 143, 144.

## NUMBER V.

A MAN having Money, Goods, and Effects, but  
no Real estate.

1. Gives to his Son 400*l*. To a Daughter, 300*l*.
2. To two Daughters, 300*l* each, to be paid when they attain their several Ages of 21 Years, or be married: The Interest, in the mean time, to be applied for their Maintenance.
3. Provide, if the Daughters marry under Age, and without their Mother's Consent, their Legacies to go to first mentioned Son and Daughter.
4. Gives to Wife the use of Household goods during her Life, and the whole thereof to his Son after her Death.
5. Residue to Wife, who is made Executrix.

- IN THE NAME OF GOD, AMEN. I John Tomkin, of the parish of Saint Martin in the Fields, in the county of Middlesex, Baker, being in health of body, and of sound mind, memory, and understanding, praised be God for the same, do make this my last will and testament in manner following:
1. I give and bequeath to my son Thomas Tomkin, the sum of 400*l*, and to my daughter Mary Tomkin, the sum of 300*l*. Also, I give and bequeath unto my daughters Jane and Frances Tomkin, the sum of 300*l* each; to be paid when and as they attain their several and respective ages of 21 years, or on the day or days of their respective marriage, which shall first happen, provided they marry with consent as hereafter mentioned; and until my said daughters Jane and Frances shall so attain their ages of 21 years, or be married, my will is that the interest and produce of their several legacies shall be paid and applied towards their maintenance and education, in such manner as my executrix herein after named, shall according to her discretion think fit: PROVIDED always, nevertheless, and my will and mind is, that in case one or both of my said daughters Jane and Frances shall marry before having attained 21 years of age, and without having first obtained consent in writing under the hand of my said executrix, then from and immediately after such one or both of them as may be so married, I do hereby give and bequeath the legacy or said sum of 300*l* of such of my said two daughters as shall be married, without

- having obtained consent as aforesaid, unto my said son Thomas, and my daughter Mary Tomkin, equally to be divided between them<sup>s</sup>. AND I do hereby give to my wife

4. Elizabeth Tomkin, the use of <sup>the whole of</sup> ~~one half~~ of my plate, linen, china, household goods and furniture, which shall be in my <sup>the</sup> dwelling-house at time of my death, TO HOLD, use, occupy, and possess the same during her life; and from and immediately after her death, I give and bequeath the said plate, linen, china, household goods and furniture, unto my aforesaid son Thomas Tomkin, his executors, administrators, and assigns. ALL the rest, residue, and remainder of my money, goods, chattels, estate and effects, of what nature or kind

herein  
soever, not, before given and disposed of, after payment of my just debts, funeral expences, and the expence of proving this my will, I give and bequeath unto my said wife, her executors, administrators, and assigns; and I do make, nominate, constitute and appoint, my said wife sole executrix of this my last will and testament, hereby revoking and making void all and every other will and wills at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal the day of in the year of your Lord 17 .

SIGNED, sealed, declared, and published,  
by the abovenamed John Tomkin the testator, as and for his last will and testament (the above erasement and interlineations therein being first made, namely, the words, (one half of) erased, and the words (the whole of) interlined, likewise, the word (the) and the word (herein) interlined) as and for his last will and testament, in the presence of us, who, at his request, and in his presence have subscribed our names as witnesses,

JOHN TOMKIN.

[Place of  
the Seal.]

LAZARUS MITFORD,

NOAH OLIVER,

<sup>s</sup> If a legacy in this case is not given over to another, the condition will not be effectual, as mentioned page 160.

<sup>h</sup> It is common both in wills and deeds to cut or scrape out mistakes and wrong words or letters, but it is far better to erase the same in the above form, and to take notice thereof in the attestation, as we have here done for an example.



## NUMBER VI.

A MAN having a large Stock in Trade, and other Personal estate, to a considerable Amount; but no Real estate.

1. *Takes Notice that his Wife is provided for by Settlement, and as a Token of Love gives her some Plate, Household goods, and Mourning.*
2. *Gives Legacies to two Brothers for Mourning.*
3. *Legacies to Executors for Care and Trouble.*
4. *Residue of Household-goods, Chattels, Stock in Trade, Estate and Effects, to two Persons upon Trust to sell; and the Money arising therefrom, and from Debts due to him, to place out at Interest for the Benefit of his Son and two Daughters, and such other Children as he might have living, or his Wife be enstient with at the Time of his Death. The Interest to be applied towards their Maintenance and Education, and the Principal to be paid at their severel Ages of twenty-one Years. In case any or either die under Age, leaving Issue, such to have their Parents Share; and in case of all their Deaths without Issue, Wife to have the Whole. If she be then dead, Testator's Brothers to have it.*
5. *Trustees empowered to alter or change the Securities on which the Moneys be placed, and to apply the Children's Share of the Principal for putting any or either of them to Business, or setting them up therein, or advancing them in Marriage.*
6. *Indemnified against Expences and involuntary Loss.*
7. *Appointed Executors, and constituted Guardians with Testator's Wife.*

IN THE NAME OF GOD, AMEN. I William Wharton, of the parish of Saint Martin in the Fields, in the county of Middlesex, Upholsterer, being sick and weak in body, but of sound and disposing mind, memory, and understanding, thanks be to God for the same, do make this my last will and testament in manner following;

1. WHEREAS my dear and loving wife Martha Wharton is provided for by settlement made on her marriage, and thereby, on my death, will, amongst other things, be entitled to, and possessed of a dwelling house, messuage, or tenement, situate and being at Knightsbridge, in the parish of Saint George, Hanover Square, in the said county of Middlesex, for the term of her life: Now, in token of the love and affection I have and bear for and towards my said wife, I give and bequeath to her all the plate, linen, china, house-

hold

- hold goods, and furniture of all kinds, which shall be in the  
aforesaid dwelling-house at the time of my death, and also  
the sum of 20 guineas for a ring and mourning. AND I give  
and bequeath to my brothers John and Thomas Wharton, the  
like sum of 20 guineas each for a ring and mourning. ALSO,  
I give and bequeath unto John Jones, and Thomas Jenkins,  
of Knightsbridge aforesaid, Esquires, my executors and trustees  
hereinafter named, the sum of 60*l* each, for the care and  
trouble they may have in executing this my will, and per-  
forming the trusts hereby in them reposed. ALL the rest,  
residue, and remainder of my plate, linen, china, household  
goods and furniture, and all other my goods, chattels, stock  
in trade, estate, and effects of what nature or kind soever, not  
herein-before given or bequeathed, I give and bequeath unto  
the said John Jones and Thomas Jenkins, TO HOLD to them  
the said John Jones and Thomas Jenkins, their executors, ad-  
ministrators, and assigns, upon this special trust and confi-  
dence nevertheless, that is to say, that they my said trustees,  
or the survivor of them, or the executors or administrators of  
such survivor, do and shall, as soon as convenient after my  
death, sell and dispose thereof, and call in and receive all such  
debts, sum or sums of money, as shall be due or owing to me  
at the time of my death, and place the moneys arising by  
such sale or disposal, and the moneys so to be called in and re-  
ceived, upon government, or other good and sufficient secu-  
rity, in their own names, and in such manner as they shall  
think proper. AND ALSO in trust, that they do and shall re-  
ceive the interest and dividends thereof from time to time, as  
the same shall become payable, and pay, apply, and dispose of  
the same, or a sufficient part thereof, for and towards the  
maintenance, education, support, and bringing up of my  
son James, and my daughters Mary and Elizabeth Whar-  
ton, and such other child or children, as I shall have living,  
or that my said wife may be enſient with at the time of my  
death, until my said children shall severally and respectively  
attain their several and respective ages of 21 years; and when  
and as my said children shall severally and respectively attain  
their said ages of 21 years; in trust to pay, assign, transfer,  
and convey all the said residue of my estate and effects, with  
the interest, dividends, and produce thereof, as shall not have  
been applied for and towards the maintenance and education  
of my said children as aforesaid, or for putting any or either  
of them to business, or otherwise advancing any or either of  
them in life, pursuant to the power hereinafter for that pur-  
pose contained, equally unto and amongst all my said chil-  
dren, when and as they shall severally and respectively attain  
their said ages of 21 years: and in case any or either of my  
said children shall happen to die before having attained 21  
years of age, without leaving issue of his or her body lawfully  
begotten;

- begotten; then in trust to pay, assign, transfer, and convey all the said residue of my estate and effects, and the interest, dividends, and produce thereof, or such part thereof as shall remain unapplied as aforesaid, unto such of my said children as shall live to attain his, her, or their respective age or ages of 21 years, share and share alike, if more than one. But in case any or either of my said children shall happen to die under age, leaving issue of his, her, or their body or bodies lawfully begotten; then in trust to pay, assign, transfer, and convey the part or share of such deceased child or children unto such his, her, or their issue, share and share alike (if more than one), when and so soon as they shall severally and respectively attain their several and respective ages of 21 years, and to pay and apply the interest, dividends, and produce thereof, in the mean time, for and towards their respective maintenance and education. But in case all and every of my said children shall happen to die under age, and without leaving issue of his, her, or their body or bodies lawfully begotten; then in trust to pay, assign, transfer, and convey the said residue of my estate and effects, and the interest, dividends, and produce thereof, or such part thereof as shall remain unapplied as aforesaid, unto my said dear and loving wife Martha Wharton, her executors, administrators, and assigns. But in case she shall be then dead; then in trust, to pay, assign, transfer, and convey the same unto my aforesaid two brothers John and Thomas Wharton, or such one of them as shall be then living; and I do hereby empower and direct my said trustees to pay, assign, transfer, and convey the same accordingly. AND I do authorize and empower my said trustees, from time to time, as often as they shall think proper, to alter and change the securities on which the said residue of my estate and effects shall hereafter be placed out, and from time to time, as often as they shall think fit, again to place the same out upon government, or such other good and sufficient security or securities, as they shall think proper; and I do hereby also authorize and empower my said trustees to apply the respective part or share of any or either of my aforesaid children, or the respective part or share of any or either of their lawful issues (in case any or either of them die under age leaving issue as aforesaid) of and in the said residue of my estate and effects, for putting any or either of my said children, his, her, or their lawful issue, out to business, or any suitable employ, or for setting him, her, or them up in business, or advancing him, her, or them respectively, in any employ or otherwise, for his, her, or their respective advancement in the world by marrying, or otherwise howsoever, any thing in this my will contained to the contrary thereof in any wise notwithstanding. AND it is my will and meaning, that my said trustees, or either of them, shall not be liable to
- 5.
- 6.
- answer

answer or make good any loss or losses that shall or may happen to the aforesaid residue of my estate and effects, in placing out the trust moneys, according to the directions in this my will, or in transacting any money affairs, or otherwise relating to or concerning the execution of the trusts mentioned in this my will, unless the same shall appear to happen by or through their or either of their wilful neglect or default; nor shall either of them my said trustees be answerable or accountable for the acts, deeds, receipts, or disbursements of the other of them; but each of them shall be answerable only for his own separate acts, deeds, receipts, and disbursements: And I do hereby direct that my said trustees shall and may pay and reimburse themselves and himself out of the aforesaid residue of my estate and effects, all reasonable and necessary costs, charges, and expences whatsoever, that they or either of them shall or may bear, pay, be put unto, or sustain in or about the execution of this my will, or the trust hereby in them reposed. AND LASTLY, I do hereby nominate, constitute, and appoint my said trustees the said John Jones and Thomas Jenkins, executors of this my last will and testament: and I do hereby also nominate, constitute, and appoint my said wife, so long as she shall continue my widow, and no longer, together with my said trustees, guardians of my aforesaid son James, and my daughters Mary and Elizabeth Wharton, and of all, any, and every such other child or children as I shall have living, or that my said wife may be enient with at the time of my death<sup>f</sup>: and do hereby revoke and make void all former and other will and wills by me at any time heretofore made, and do declare this to be my last will and testament: IN WITNESS whereof I have at the bottom of the two first sheets of this my will (the whole whereof is contained in three sheets of paper) subscribed my name, and to this third and last sheet, my hand and seal & the day of                      in the year of our Lord 17 .

SIGNED, sealed, &c. }  
[as in No. I.] }

WILLIAM WHARTON.

[Place of  
the Seal.]

<sup>f</sup> To appoint guardians, any father has power, as was shewn in page 102.

<sup>k</sup> When the will is contained in more than one sheet of paper, the sheets in which it is contained are usually tied together at the top with incle or tape, and then the testator writes his name on the right hand side, at the bottom of each, and puts his seal to the last. The witnesses write their names at the bottom on the left hand side of all the sheets; in the last whereof, over the place where those write their names, it is wrote "Signed, sealed, &c." [as in No. I.]; but in the other sheets only the single word "Witnesses," is wrote just over the place where they write their names.

## NUMBER VII.

A MAN possessed of Real estates, Copyhold estates of inheritance, Personal estate, and Effects.

1. *Devise a Real estate to one in Fee-simple.*
2. *An Annuity to a Sister for Life, payable out of every of Testator's Freehold and Copyhold estates, except the Estate before devised; to be paid by half-yearly Payments free of all Charges, &c. with Power for Annuitant to enter and distrain after twenty Days Non-payment.*
3. *Another Annuity to Wife out of same Estates, payable in the same Manner, and with the same Power to distrain as given to the Sister.*
4. *Another to a Cousin out of same Estates, payable to her at a certain Sum per Week (exclusive of her Husband's Control), with same Power to enter for Non-payment, as given to the Sister.*
5. *Devise the Estates chargeable with all the Annuities to another Sister for Life.*
6. *After the Sister's Death vests the same in Trustees for preserving Contingencies, &c.*
7. *Devise the same Estates to another Sister for Life.*
8. *The same to a Man for Life. Then to Devisee's Issue in Tail Male; and in Default of Issue Male to his Issue Female, and the Heirs Male of their Bodies.*
9. *In Default of Issue from last-mentioned Devisee, devise the Estates to a Kinsman for Life. Then to Kinsman's Issue in Tail Male.*
10. *Charges the Estates with Payment of a certain Sum, if last-mentioned Devisee, or his Issue, have them by the Devisee.*
11. *If last-mentioned Devisee die without Issue; same Estates devised to another Person for Life, and then to his Issue; and on Failure thereof to Testator's own right Heirs for ever.*
12. *Directs Debts, &c. to be paid out of Personal estate.*
13. *Devise to a Public Charity.*
14. *Pecuniary and specific Legacies to a Sister.*
15. *Residue to Wife, and appoints her and a Sister Executrixes.*

IN THE NAME OF GOD, AMEN. I Thomas Noble, of Fenchurch-street, in the city of London, Esquire, being sick and weak in body, but of sound and disposing mind, memory, and understanding, praised be God for the same,  
do

- do make and declare this my last will and testament, in
1. manner and form following, that is to say, I give and devise all that my messuage or tenement, land, and hereditaments, with the appurtenances, situate, lying, and being in the parish of Rosenesne, in the county of Denbigh, and now in the tenure or occupation of David Bruce, yeoman, unto William Noble, of the parish of St. Afaph, in the said county of
  2. Denbigh, clerk, his heirs and assigns for ever: ALSO, I give, grant, and devise unto my sister Elizabeth Coleman, widow, and her assigns, for and during the term of her natural life, one clear yearly annuity, rent-charge or sum of 40l, of lawful money of Great Britain, to be issuing and payable out of all and every other my freehold estate or estates, situate and being in the county of Denbigh aforesaid, and the county of Middlesex, or either of them, or elsewhere, not herein before devised, and out of my copyhold estate, situate, lying, and being at Potters Bar, in the said county of Middlesex (which said copyhold estate I have surrendered to the use of this my will<sup>h</sup>); the said annuity or rent-charge to be paid to my said sister by equal half-yearly payments, the first whereof to begin and be made at the end and expiration of six kalendar months next after my decease, and always to be paid free and clear of and from all manner of taxes, charges, and impositions whatsoever, to be taxed, charged, or assessed upon the said annuity, or upon my said sister, in respect thereof by authority of parliament, or otherwise howsoever; and if it shall happen that the said annuity or rent-charge of 40l, or any part thereof, shall be behind or unpaid by the space of 20 days next over or after any or either of the said days whereon the same is made payable, and ought to be paid as aforesaid (being lawfully demanded), that then and from thenceforth, and from time to time as often as the same or any part thereof shall be so in arrear and unpaid, it shall and may be lawful to and for my said sister Elizabeth Coleman, and her assigns, upon the said freehold and copyhold estate and estates, every or any part or parts thereof, to enter and distrain, and the distress and distresses there found to take, lead, drive, and carry away, and to impound, detain, or otherwise to sell and dispose of the same, until thereby or otherwise, she and they shall be lawfully satisfied and paid such annuity or yearly rent-charge, or so much thereof as shall be in arrear,

<sup>h</sup> See the reason of this surrender, page 128.

- together with all costs, charges, and expences whatsoever as shall be occasioned by such entry, distress and sale<sup>1</sup>. ALSO, I give, grant, and devise unto my beloved wife Jane Noble and her assigns, one annuity or clear yearly rent charge of 40l, of lawful money of Great Britain, for and during the term of her natural life, to be issuing and payable out of and from all and every my said other freehold and copyhold estate and estates aforesaid, not herein before particularly devised, and to be payable to her half-yearly; in the manner and with the like power for my said wife Jane Noble to enter upon the said premises, and to make distress and distresses, and to make sale thereof in case of non-payment of such annuity, or any part thereof, as is herein before given to my sister Elizabeth Coleman, in case of non-payment of her annuity or rent-charge of 40l, or any part thereof as aforesaid.
4. ALSO, I give, grant, and devise unto my cousin Frances Jones, wife of John Jones, of Wrexham, in the county of Denbigh aforesaid, tallow-chandler, one other annuity or clear yearly rent-charge of 10l 8s of lawful money of Great Britain, for and during the term of her natural life, to be issuing and payable out of and from all and every my said other freehold and copyhold estate and estates aforesaid, not herein before particularly devised, and to be paid to her weekly after the rate of 4s a week; and her receipt shall be a sufficient discharge for the same, which shall not be subject to the control or intermeddling of her said husband John Jones; with the like power and with the same authority for the said Frances Jones to enter upon the said premises, and to make distress and distresses, and to make sale thereof in case of non-payment of such annuity, or any part thereof, as is herein before given to my said sister Elizabeth Coleman, in case of non-payment of her annuity or rent-charge
5. of 40l a year, or any part thereof as aforesaid. ALSO, I give and devise all and every other my said freehold and copyhold estate and estates wheresoever as aforesaid, not herein before particularly devised, but charged and charge-

<sup>1</sup> This annuity being charged on real estate, the executor has no more concern therewith than he has with a devise of real estate, mentioned page 156, wherefore the annuitant may enter and make distress and sale without his intervention.—It is most usual to make an annuity payable from the first quarter day after the testator's death, as in No. VIII. clause 2. page 243, 244.

- able with the payment of the said respective yearly annuities or rent-charges herein before particularly mentioned, unto my sister Mary Noble, spinster, for and during the term
6. of her natural life: AND from and immediately after the determination of that estate, by forfeiture or otherwise, I give and devise the same, and every part thereof, unto James Spence and Daniel Dowling, of Tottenham-court-road, in the said county of Middlesex, gentlemen, and to their heirs, in trust only, to preserve and support the contingent remainders and uses herein after limited from being defeated, barred or destroyed; and for that purpose, from time to time, and at all times, to make entries and bring actions as occasion may be or require: nevertheless to permit and suffer the said Mary Noble to receive and take the rents, issues, and profits thereof for and during the term of her natural life: AND from and immediately after the decease of my
7. said sister Mary Noble, I give and devise all and every my said other freehold and copyhold estate and estates, so given to my said sister Mary Noble, for life as aforesaid, and charged and chargeable with the several and respective annuities as aforesaid, unto and to the use of my said sister Elizabeth Coleman during the term of her natural life; and from and immediately after the determination of that estate by forfeiture or otherwise, then I give and devise the same, and every part thereof, unto the said James Spence and Daniel Dowling, and their heirs in trust as aforesaid, to preserve and support, &c. [*as in clause 6, only a different name*]: AND after her decease, then I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, devised to my said sister Elizabeth Coleman as aforesaid, and charged and chargeable as aforesaid, unto the said William Noble for and during the term of his natural life; and from and immediately after the determination of that estate by forfeiture or otherwise, I give and devise the same, and every part thereof, unto the said James Spence and Daniel Dowling and their heirs, in trust as aforesaid to preserve and support, &c. [*as in clause 6, only a different name*]: and from and immediately after the decease of the said William Noble, I give and devise all and every my said other freehold and copyhold estate and estates so given to the said William Noble for life as aforesaid, and charged and chargeable as aforesaid, unto and to the use and behoof of the first son lawfully begotten, or to be begotten of the said William Noble, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use and behoof of the second, third, and all and every other son and sons of the said William



- liam Noble, and the heirs male of the body and bodies of such second, third, and other son and sons lawfully begotten or to be begotten, severally and successively, as they shall be in seniority of age and priority of birth; that is to say, the eldest of such son and sons, and the heirs male of his and their body and bodies being always to be preferred before the younger of such son and sons, and the heirs male of his and their body and bodies lawfully to be begotten; and for default of such issue, then I give and devise all and every my said other freehold and copyhold estate and estates wheresoever as aforesaid devised, to the first daughter of the said William Noble, lawfully begotten or to be begotten, and to the heirs male of the body of such first daughter lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, and all and every other daughter and daughters of the said William Noble, and to the heirs male of the body and bodies of such second, third, and other daughter, lawfully begotten, or to be begotten, severally and successively, as they shall be in seniority of age and priority of birth: AND for default of such issue, then I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, so devised to the issue of the said William Noble as aforesaid, and charged and chargeable as aforesaid, unto and to my kinsman John Banks, son of Thomas Banks of Wrexham, in the county of Denbigh aforesaid, tallow-chandler, by Jane his wife, for and during the term of his natural life; and from and immediately after the determination of that estate, by forfeiture or otherwise, then I give and devise the same, and every part thereof, unto the said James Spence and Daniel Dowling, and their heirs in trust as aforesaid, to preserve and support, &c. [*as in clause 6, only a different name*], and from and immediately after the decease of the said John Banks, I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, so given to the said John Banks for life, as aforesaid, and charged and chargeable as aforesaid, unto and to the use of the first son of the said John Banks, lawfully begotten, &c. [*the same as to the issue of William Noble in clause 8.*] AND my will is, that in case the abovenamed John Banks or his issue shall at any time hereafter be seised or possessed of the freehold and copyhold estates so devised as aforesaid, the sum of 100l shall then be paid to William Banks, brother of the said John Banks; and I do hereby charge the said estates with the payment thereof accordingly: AND for default of such issue of the said John Banks, I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, so devised to the issue of the said John Banks, as aforesaid, and charged and chargeable with the payment of

- the several annuities, as aforesaid, unto and to Thomas Watson, of, &c. and his issue [*in same manner as devised to William Noble in clause 8.*] and for want of such issue, to my own
12. right heirs for ever<sup>1</sup>. AND I do will, order, and direct, that all my just debts, funeral expences, and the charges of proving this my will, be, by my executors herein after named,
  13. paid and discharged out of my personal estate; and after payment thereof, I give and bequeath to the president, treasurer, and governors of Christ's Hospital, London, the sum of 200l for the use of the said hospital; the same to be
  14. paid within nine months after my decease. ALSO, I give and bequeath unto my said sister Elizabeth Coleman, the sum of 20l, my gold watch, silver pint and quart cups, marked
  15. T. N. and all my silver tea-spoons. ALL the rest, residue and remainder of my personal estate, of what nature or kind soever, I give and bequeath the same, and every part thereof (after the payment of my debts, funeral expences, charges of proving this my will, and legacies as aforesaid) unto my said wife Jane Noble: AND I do hereby nominate, constitute, and appoint my said wife Jane Noble, and my said sister Elizabeth Coleman, executrixes of this my last will and testament; hereby revoking and making void all former wills and

<sup>1</sup> By those devises and limitations begun at clause 5, may be perceived how a man may limit his lands to as many persons as are in being for life, with remainders in tail to as many of them as he thinks fit; and hereby he acts consistent with the rules of law and equity; as here, although neither of the persons to whom those estates are in this manner devised for life, can convey for any longer term than his or her own life; yet the issue to whom the estates are limited, and who will by this devise take estates tail, either of them, when in possession, may be enabled, by suffering a common recovery, to convey the inheritance: So where real estate is devised to any one in fee-tail general (defined p. 115.) without any remainder or reversion expectant thereon, the entail may be effectually barred by a fine. — Concerning a remainder we gave a hint in page 33; and here we have a description both of a remainder and reversion, as here we see estates are given to several persons for life, with limitations to their issue in tail, which are called remainders; and for want of such issue the testator ultimately gives the estates to his own right heirs for ever, which latter is called a reversion, and this would have existed had the testator made no mention thereof; for if there be a gift for life or in tail, and no disposition of the fee, the reversion is, without any special reservation, vested in the donor by act of law, and the fee will return to him or his heirs after the estate carved thereout is spent, unless prevented by a recovery being suffered. Now where there is no remainder over, the tenant in tail general may effectually bar the entail by a fine, provided he has also the reversion in himself, which he may possibly have on the donor's death, as being his right heir. But where there is any remainder over, or a reversion that is not in the tenant in tail, a recovery should be suffered for effectually barring the whole. To explain the reason of this and other points here touched upon, a copious treatment on the doctrine of remainders, reversions, fines, and recoveries, would be requisite; and as this might probably be tedious to some of our readers, and likewise would be rather an invasion on the general subjects of this work, we shall refer such as are desirous of fuller information, to Black. Com. 2 V. 163. 175. 349. 357. where this doctrine is discussed.

testa-

testaments at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof I have, at the bottom of the three first sheets of this my will (the whole whereof is contained in four sheets of paper), subscribed my name, and to this fourth and last sheet my hand and seal, the day of \_\_\_\_\_ in the year of our Lord 17 \_\_\_\_\_

SIGNED, sealed, &c. [as in No. I. *only here must be three witnesses.*] THOMAS NOBLE.

[Place of  
the Seal.]

## NUMBER VIII.

A MAN makes his Will of his Real estate only, and devises the same to a Single Woman, chargeable with an Annuity given to his Natural Daughter thereout.

1. *Devises the Estate subject to the Annuity.*
2. *Gives the Annuity payable Half-yearly, with Power to enter and distrain after 20 Days Non-payment.*
3. *Power to enter and receive the Rents after 40 Days Non-payment.*

IN THE NAME OF GOD, AMEN. I. M. J. of the parish of \_\_\_\_\_ in the county of Middlesex, gentleman, being in health of body, and of sound and disposing mind, memory, and understanding, praised be God for the same, do make

1. this my last will, in manner following: I give and devise unto Isabella Puella, of the parish of \_\_\_\_\_ aforesaid, single woman, all that my messuage, tenement, land, and hereditaments, with the appurtenances, situate, lying, and being at \_\_\_\_\_, and now in the tenure or occupation of \_\_\_\_\_; To HOLD unto her the said Isabella Puella, her heirs and assigns for ever; SUBJECT nevertheless to, and charged and chargeable with, the annuity, yearly rent, or sum of forty pounds, herein after mentioned. AND I do hereby give, devise, and bequeath, unto Jane Puella (the natural daughter of the said Isabella Puella), and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of 40l of lawful money of Great Britain, free of all taxes and other deductions parliamentary or otherwise, to be issuing and payable out of the said messuage or tenement, land, and hereditaments, and to be paid and payable by half-yearly payments,

- payments, at and upon the feast-days of *Saint John the Baptist* and the *birth of our Lord Christ*; the first payment thereof to be on such of the same feast-days as shall first and next happen after my decease; and I do hereby charge and subject the said messuage or tenement, land, and hereditaments, to and with the payment of the said annuity, yearly rent, or sum of 40*l*, accordingly: and my will is, that in case the said annuity, or any part thereof, shall be behind or unpaid by the space of twenty days next after either of the aforesaid feast-days whereon the same is herein before directed to be paid as aforesaid (being lawfully demanded), that then and so often as the same, or any part thereof, shall be so in arrear, it shall and may be lawful for the said Jane Puella, and her assigns, to enter upon the said premises charged with the said annuity as aforesaid, and distrain for the same, or for so much thereof as shall be so in arrear, and the distress and distresses then and there found to detain and keep, until she shall be fully paid and satisfied all such arrearages, with costs and charges in and about the making and keeping thereof. 3. AND in case the said annuity, or any part thereof, shall be behind and unpaid by the space of forty days next after either of the said days of payment whereon the same ought to be paid as aforesaid, that then and so often as the same, or any part thereof, shall be so in arrear, it shall and may be lawful for the said Jane Puella and her assigns, into all and singular the premises charged with the said annuity as aforesaid, to enter, and the rents, issues, and profits thereof to receive and take, until she be therewith and thereby, or by the person or persons who shall be then entitled to the immediate possession of the premises, paid and satisfied the same, and every part thereof, and all the arrears thereof incurred before, and that shall incur during such time as she shall receive the rents, issues, and profits thereof, or be entitled to receive the same by virtue of such entry to be made as aforesaid, together with her cost, charges, and expences, laid out and sustained by reason of the non-payment thereof, or any part thereof<sup>m</sup>. IN WITNESS whereof I have hereunto set my hand and seal, the            day of            in the year of our Lord 17

SIGNED, sealed, &c. [as in No. I.  
only here must be three witnesses.]

M. J.

[Place of  
the Seal.]

<sup>m</sup> Where the will concerns only land there is no need of an executor, neither ought it to be proved in the spiritual court, as mentioned p. 172. For establishing the same, and perpetuating the testimony thereof, it may be proved in chancery, as mentioned page 194.

## NUMBER IX.

## A C O D I C I L,

Whereby a Will is altered and new Legacies given.

WHEREAS I John Manning, of Fleet-street, in the city of London, hofier, have made and duly excuted my last will and testament in writing, bearing date the 4th day of September 1787, and thereby given and bequeathed the sum of 200l unto Thomas Mun; now, I do hereby revoke and make void the said legacy of 200l, so given and bequeathed by my said will unto the said Thomas Mun, and do give and bequeath the said sum of 200l unto James Franks, of Cheapside, London, haberdasher; Also, I do revoke and make void the two several legacies of 100l apiece, given and bequeathed by my said will unto Christopher Ham and William Ham, and do give and bequeath unto the said Christopher Ham and William Ham the sum of 40l apiece, and no more: AND I do hereby give and bequeath unto Richard Win, of Foster-lane, London, cordwainer, the sum of 120l. And I do ordain and declare this present writing to be a codicil to my said will, and that the same shall be annexed thereto, and taken as part thereof; and do confirm my said will in every particular thereof that is not hereby altered or revoked: IN WITNESS whereof I have to this codicil set my hand and seal the day of                      in the year of our Lord 17   ,

SIGNED, sealed, declared, and published, by the said John Manning, as and for a codicil to be annexed to his last will and testament, and to be taken as part thereof, in the presence of

JOHN MANNING.

[Place of  
the Seal.]

Two witnesses. [See a codicil described, page 167, 168.]

## NUMBER X.

## A NUNCUPATIVE WILL.

THE LAST WILL of Thomas Mors, late of Rude-lane, in the city of London, gentleman, deceased, declared by him by word of mouth the 4th day of September 1785. [*Here insert the words as spoken by the deceased, and conclude thus*]: Those were the words spoken by the said deceased Thomas Mors, in the presence of us who have hereunto subscribed our names as witnesses thereof, this            day of            17 .

Three witnesses. [See a definition of this will, p. 161, 162.]

## NUMBER XI.

A RELEASE or DISCHARGE for a Legacy.—See the Stamp on which this and the two following forms are to be written<sup>a</sup>, Page 64—66.

TO ALL TO WHOM these presents shall come, I John Franks of Woodstreet, in the city of London, silversmith, send *greeting*. WHEREAS Thomas Smith, late of Fleet-ditch, in the said city of London, butcher, deceased, in and by his last will and testament in writing, bearing date on or about the 4th day of September 1785, did give and bequeath unto me the said John Franks the sum of 60l, and the said Thomas Smith, by his said will, made and constituted William Mun and James Dun, executors thereof. NOW KNOW ALL by these presents, That I the said John Franks do hereby acknowledge to have received of and from the said William Mun and James Dun, the said sum of 60l, so given and bequeathed to me in and by the said will of

<sup>a</sup> The stamps on which these discharges are to be written, being very considerable in price, some persons through timidity may be afraid to write thereon, lest they should spoil their work, and thereby lose both the stamp and their labour; wherefore to obviate any scruple of this kind, we may observe, that the stamp need not be lost, if the writing thereon should not be carried into execution; it being very common for young clerks and writers, either through inattention, or deficiency of knowledge, to render their writing so defective, as that the paper or parchment thereby becomes useless, and is thrown aside; yet the stamp or duty thereon will not be lost, if the useless writing is carried to and left at the stamp office at Somerset-place, and there oath be made that no use was ever made thereof, or benefit or advantage derived therefrom; as thereon a new stamp will be allowed in the room of that spoiled; and so when misfortunes of this kind happen in the country, if the spoiled writing is carried to, and left with the distributor of the stamps, and oath made before him as above mentioned, a new stamp will be allowed.

the said Thomas Smith as aforefaid, and thereof, and of and from every part thereof, do fully, clearly, and abfolutely acquit, releafe, and for ever difcharge, the faid William Mun and James Dun, their heirs, executors, administrators, and assigns, and alfo the eftate and effects of the faid teftator, and every part thereof; AND in confideration thereof, I the faid John Franks do, for myfelf, my executors, administrators, and assigns, remife and releafe unto the faid William Mun and James Dun, their heirs, executors, and administrators, all and all manner of action and actions, caufe and caufes of action, fuits, legacies, fum and fums of money, judgments, executions, claims and demands whatfoever, both at law and in equity, which againft the faid William Mun and James Dun, their heirs, executors, or administrators, or the eftate or effects of the faid teftator, I the faid John Franks ever had, or which I, my executors, administrators, or assigns, can or may have, claim, challenge, or demand, for or by reafon or means, or on account of the faid fum of 60l, fo given and bequeathed to me in and by the faid laft will and teftament of the faid Thomas Smith as aforefaid. IN WITNESS whereof I the faid John Franks have hereunto fet my hand and feal the            day of            in the year of our Lord ° 17 .

SEALED and delivered  
in the prefence of

Simon Simpson,  
Noah Moor.

JOHN FRANKS.

[Place of  
the Seal.]

• Figures are put here for the fake of brevity, but deeds as well as wills fhould be written in words at full length; and as this and the other forms hereafter laid down are precedents for deeds, we fhall make a few brief obfervations concerning fealing, figning, and delivering, or what is termed, executing and witneffing the fame, after being written on paper or parchment legally ftamped; in order that thereby the whole proceeding may be made valid in law. And preparatory hereto we may firft take notice of what has been mentioned, p. 141, 142. concerning reading a will, which is alfo applicable to a deed; as for making a good deed, it is requifite that it be read wherever any of the parties defire it; and if it be not done on his request the deed is void as to him. If he can he fhould read it himfelf: if he be blind or illiterate another muft read it to him. If it be read falſely, it will be void; at leaft for fo much as is mifrecited, unlefs it be agreed by colluſion that the deed ſhall be read falſe on purpoſe to make it void; for in ſuch caſe it ſhall bind the fraudulent party. Black. Com. 2. V. 304. The deed being thus perfectly read, it is requifite that the party ſeal it, which is uſually done by his putting any ſeal upon the wax and impreſſion made thereon by the perſon who prepared the deed; and likewise he ſhould ſign it, by writing his name as in the above form; but if he cannot write his name he may, as is uſual, make a mark with his pen oppoſite the ſeal, which is moſt commonly made in this form X. The party having now ſealed and ſigned, the next requifite to perfecting the deed is, that he deliver it abſolutely; the uſual method whereof is, for him to take the ſame up in his hand and ſay "I deliver this as my act and deed," and thereupon deliver it down on the table or place from whence he took it up, or to the party to whom it is made. From this tradition or delivery the deed only takes effect; for if the date be falſe or impoſſible the delivery aſcertains the time of it; and hereby the party delivering adopts the fealing if another perſon and not himſelf ſhould have ſealed it, and by a parity of reafon, the ſigning alſo, and makes them both his own. Black. Com. 2. V. 306. The deed being thus executed in the prefence of witneſſes (who ſhould be perſons diſintereſted), thoſe ſubſcribe their names as in the above form.

## NUMBER XII.

DISCHARGE to Executors where the Testator bequeathed the Residue of his Estate and Effects to them, upon trust for his Children, with a benefit to the Survivors if either should die under age. — Stamp referred to in N°. XI.

1. *Recites the Will and Bequest to the Trustees, with the various Trusts.*
2. *The Trustees' power of applying the Children's Share for putting them to Business, &c.*
3. *That Testator left 3 Children, all of whom are living, and that the Trustees proved his Will, &c.*
4. *That one Child hath attained 21 Years of Age; and by the Trustees' Account the 3 Children have been advanced different Sums; and that 1000l of Testator's Estate is undisposed of.*
5. *That for making an equal Division, the several Sums advanced for each Child are added to the 1000l; and the whole divided into 3 equal Shares, and out of each separate Share deducted the separate Sums advanced.*
6. *Child of Age releases Testator's Estate, and the Trustees, of all future Claim, except what may accrue to him by either of the younger Children dying under Age.*

TO ALL TO WHOM these presents shall come, Amos Beal of the parish of St. Martin in the Fields, in the county of Middlesex, ironmonger, sends greeting. WHEREAS Charles Beal, late of the said parish of St. Martin in the Fields, linen-draper, deceased, in and by his last will and testament in writing, bearing date on or about the 8th day of June 1785, after having thereby bequeathed divers legacies, did give and bequeath all the rest, residue and remainder of his plate, china, household goods, and furniture, and all other his goods, chattels, stock in trade, estate and effects, of what nature or kind soever, to David Evans and Francis Gifford, TO HOLD unto them, their executors, administrators, and assigns, upon this special trust and confidence, that they the said trustees, or the survivor of them, or the executors, or administrators, of such survivor, should, as soon as convenient after his death, sell and dispose thereof, and call in and receive all such debts, sum or sums of money,

as



- as should be due or owing to him at the time of his death, and place the moneys arising by such sale or disposal, and the moneys so to be called in and received, upon government or other good and sufficient security, in their own names, and in such manner as they should think proper: AND ALSO in trust, that they should receive the interest and dividends thereof from time to time as the same should become payable, and pay, apply, and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education, support, and bringing up, of his son the said Amos, and his daughters Hannah and Jane Beal, and such other child or children as he should have living, or that his wife might be enient with at the time of his death, until his said children should severally and respectively attain their several and respective ages of 21 years; and when and as his said children should severally and respectively attain their said ages of 21 years; in trust to pay, assign, transfer, and convey all the said residue of his estate and effects, with the interest, dividends, and produce thereof, as should not have been applied for and towards the maintenance and education of his said children as aforesaid, or for putting any or either of them to business, or otherwise advancing any or either of them in life, pursuant to the power in his said will for that purpose afterwards contained, equally unto and amongst all his said children, when and as they should severally and respectively attain their said ages of 21 years; and in case any or either of his said children should happen to die before having attained 21 years of age, without leaving issue of his or her body lawfully begotten; then in trust to pay, assign, transfer and convey, all the said residue of his estate and effects, and the interest, dividends, and produce thereof, or such part thereof as should remain unapplied as aforesaid, unto such of his said children as should live to attain his, her, or their, respective age or ages of
2. 21 years, share and share alike if more than one: AND WHEREAS the said Charles Beal in and by his said will, did authorize and empower his said trustees to apply the respective part or share of any or either of his aforesaid children, of and in the said residue of his estate and effects, for putting any or either of them, his, her, or their, lawful issue, out to business, or any suitable employ, or for setting him, her, or them, up in business, or advancing him, her, or them, respectively in any employ or otherwise, for his, her, or their, respective advancement in the world, by marrying  
or

- or otherwise howsoever; and the said testator nominated, constituted, and appointed the said trustees, the said David Evans and Francis Gifford, executors of his said last will and testament, as in and by the same, relation being thereunto had, what is herein before in part recited will more fully and at large appear: AND WHEREAS the said testator died without altering or revoking his said will, leaving his aforesaid 3 children, his only issue him surviving (all of whom are now living); and shortly after his death the said David Evans and Francis Gifford, proved his said will in the prerogative court of Canterbury, and took upon them the said executorship and trust: AND WHEREAS the said Amos Beal hath attained his said age of 21 years, and the said trustees have made up an account of and concerning the said residuary estate and effects, and all moneys received and paid by them, in pursuance of the said trust and executorship, whereby it appears they have advanced, paid, laid out, and expended, to, for, and on account of, the said Amos Beal, the sum of 400l, to, for, and on account of, the said Hannah Beal, the sum of 300l, and to, for, and on account of, the said Jane Beal, the sum of 250l, and that there is now remaining in their hands, and on good security, as placed out by them, the sum of 1000l of and belonging to the said residuary estate and effects of the said Charles Beal: AND WHEREAS for making a just and equal division of the said sum of 1000l among the aforesaid 3 children; pursuant to the said last will and testament of the said Charles Beal, it is agreed to add the aforesaid three several sums of 400l, 300l, and 250l, to the said sum of 1000l, which makes the same 1950l, and then to divide the whole into three equal shares, and deduct out of each third part what has respectively been advanced, paid, laid out, and expended, to, for, and on account of each child, whereby the share of the said Amos Beal therein appears to be the sum of 250l. Now THESE PRESENTS WITNESS, that as well for and in consideration of the said sum of 400l, heretofore advanced, paid, laid out, and expended, to, for, and on account of the said Amos Beal as aforesaid, and of the said sum of 250l, to him in hand paid by the said David Evans and Francis Gifford, at or before the execution of these presents, the receipt whereof is hereby acknowledged, he the said Amos Beal HATH, remised, released, and for ever discharged, and by these presents DOETH, remise, release, and for ever discharge the said David Evans and Francis Gifford, their executors, administrators, and assigns, of and from all

all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said Amos Beal, of, in, and to, the said residue of the estate and effects of the said Charles Beal deceased, by virtue of his said will or otherwise howsoever; AND ALSO of and from all and all manner of action and actions, suits, bills, bonds, writings, obligations, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, both at law and in equity, or otherwise howsoever, which against the said David Evans and Francis Gifford, or either of them, in their or either of their own right, or as trustees, or executors, constituted and appointed in and by the said last will and testament of the said Charles Beal deceased, or otherwise, he the said Amos Beal now hath, or ever had, or which he, his executors, administrators, or assigns, shall or may hereafter have, claim, challenge, or demand, for or by reason, or means, or on account thereof, or for or by reason, or means, or on account of the said residuary estate and effects of the said Charles Beal, or for or by reason, or means, of any act, matter, or thing, incident or relative thereto, from the beginning of the world to the day of the date hereof, (SAVE and except all such estate, right, title, and interest, as may accrue to him the said Amos Beal, or which he may at any time hereafter have, claim, challenge or demand, of, in, or unto the said residuary estate and effects of the said Charles Beal deceased, or any part or parcel thereof, from, by, or on account of the death of both or either of the aforesaid Hannah and Jane Beal, which is not intended by these presents to be released): IN WITNESS whereof the said Amos Beal hath hereunto set his hand and seal, &c. [as in N<sup>o</sup>. XI.]

M U M B E R XIII.

DISCHARGE for Legacies by Husband and Wife <sup>P.</sup>  
Stamp referred to in N<sup>o</sup>. XI.

TO ALL TO WHOM these presents shall come, Andrew Baker, of Milk-street, Cheap-side, in the city of London, cordwainer,

<sup>P</sup> Where any legacy is given to a woman who marries before the same is paid or delivered to her, the husband should join in the discharge. So likewise if a legacy be given to a woman during her marriage; unless in either of those cases it should appear clear by the will that the husband can in no wise have any claim thereto, or interference therewith.—Concerning this, see p. 129. 157, 158.

and Catharine his wife, send *greeting*. WHEREAS David Evans late of Milk-street aforesaid, victualler, in and by his last will and testament in writing, bearing date on or about the 8th day of June 1785, did give and bequeath unto the said Catharine, by her then name and description of his cousin Catharine Ford, spinster, the bed with a mahogany four post bedstead, bolster and pillow, and the mahogany chest upon drawers, together with six hair bottom mahogany chairs, and pillow and claw mahogany table board, parcel of the furniture in the room over the dining-room, on the two pair of stairs in the dwelling-house of the said David Evans; and also did give and bequeath unto the said Catharine the sum of 100l; and the said David Evans nominated and appointed George Hand, and James Knowel; executors of his said will, who since his death have duly proved the same in the Prerogative Court of Canterbury: AND WHEREAS, since the death of the said David Evans, the said Catharine Ford hath intermarried with the said Andrew Baker: NOW THESE PRESENTS WITNESS, that the said Andrew Baker and Catharine his wife, do hereby acknowledge to have received of and from the said George Hand and James Knowel, the aforesaid bed, four post bedstead, bolster and pillow, the mahogany chest upon drawers, the six mahogany chairs, and table board, and also the said sum of 100l, so given and bequeathed to the said Catharine, in and by the said last will and testament of the said David Evans as aforesaid; and thereof, and of and from every part thereof, do fully, clearly, and absolutely, acquit, release, and for ever discharge, the said George Hand and James Knowel, their executors, administrators, and assigns, and also the estate and effects of the said testator, and every part thereof; AND; in consideration thereof, they the said Andrew Baker, and Catharine his wife, do for themselves, their executors, administrators, and assigns, remise, and release, unto the said George Hand, and James Knowel, their executors and administrators, all, and all manner of action and actions, cause and causes of action, suits, legacies, sum and sums of money, judgments, executions, claims, and demands, whatsoever, both at law and in equity; which against the said George Hand and James Knowel, their executors or administrators, or the estate or effects of the said testator, they the said Andrew Baker, and Catharine his wife, or either of them, ever had, or which they, their executors, administrators, or assigns, can or may have, claim, challenge, or demand, for, or by reason or means, or on account of the said furniture, or the said sum of 100l, given and bequeathed to the said

saïd Catharine, in and by the saïd last will and testament of the saïd David Evans as aforesaid. IN WITNESS whereof, the saïd Andrew Baker, and Catharine his wife, have hereunto set their hands and seals, &c. (as in No. XI. *only here, being two persons to execute, there must be two seals to the deed; one for the husband to write his name opposite, and the other for the wife to write her name opposite thereto*).

N U M B E R X I V.

RELEASE by a new Administrator on settling with and receiving Goods unadministered from the old.—To be written on paper or parchment having six shillings Stamp-duty thereon.

TO ALL TO WHOM these presents shall come, Alexander Ball of Great Russel-street, Bloomsbury, in the county of Middlesex, gentleman (administrator of his late deceased mother Cecilia Ball, to whom his deceased father David Ball bequeathed the whole of his estate and effects), sends *greeting*. WHEREAS Daniel Evans, uncle of the saïd Alexander Ball, did in the minority of the saïd Alexander Ball take out letters of administration of the goods and chattels of the saïd Cecilia Ball deceased, for the benefit of the saïd Alexander Ball, and the other children of the saïd Cecilia Ball: AND WHEREAS the saïd Alexander Ball having attained the age of 21 years, the saïd Daniel Evans hath resigned up his administration so taken by him as aforesaid, and letters of administration *de bonis non*, are granted to the saïd Alexander Ball of the saïd Cecilia Ball his mother, for himself and the benefit of his sisters and brother, Frances, Gratia, and Henry Ball, children of the saïd Cecilia Ball deceased: AND WHEREAS the saïd Daniel Evans, and Alexander Ball, administrators as aforesaid, have now made up and adjusted all accounts, matters and things, of and concerning all moneys received, paid, and disbursed, by the saïd Daniel Evans as administrator as aforesaid, and all other the estate whatsoever of or belonging to the saïd Cecilia Ball deceased, which have been received or come to the hands or disposition of the saïd Daniel Evans; and upon adjusting the saïd accounts there appears to be remaining in the hands of the saïd Daniel Evans the sum of 2000l in money, and one bond under the hand and seal of James Knowel of ——— in the penal sum of 1000l, with a condition to be void upon the payment of 500l on the day therein mentioned; which  
saïd

faid sum of 2000l, together with the faid bond and all writings and papers appertaining or belonging to the estate of the faid Cecilia Ball, the faid Daniel Evans hath on the day of the date hereof paid and delivered up to the faid Alexander Ball : NOW KNOW ALL by these presents, that the faid Alexander Ball doth acknowledge to have received of and from the faid Daniel Evans, the faid sum of 2000l, together with the faid bond, and all writings and papers appertaining or belonging to the estate of the faid Cecilia Ball ; and thereof, and of and from every part thereof, doth fully, clearly, and absolutely acquit, release, and for ever discharge, the faid Daniel Evans, his heirs, executors, and administrators ; AND in consideration thereof, and being satisfied in the premises, HATH, remised, released, and for ever discharged, and in and by these presents DOETH, remise, release, and for ever discharge, the faid Daniel Evans, his heirs, executors, and administrators, of and from all reckonings, accounts, sum and sums of money, by him had and received in pursuance of the faid administration so granted to him as aforesaid, and of and from all other reckonings, accounts and demands whatsoever, and all and every action and actions, cause and causes of action, suits, judgments, executions, claims and demands, both at law and in equity, or otherwise howsoever ; which against the faid Daniel Evans, he the faid Alexander Ball now hath, or ever had, or which he, his executors, or administrators, shall or may have, claim, challenge or demand, for or on account of any act, matter, or thing whatsoever, from the beginning of the world to the day of the date of these presents : IN WITNESS whereof the faid Alexander Ball hath hereunto set his hand and seal, &c. [as in N<sup>o</sup>. XI.]

## NUMBER XV.

LETTER OF ATTORNEY for proving a Seaman's Will, and doing other Business for the Executor. —

To be written on paper or parchment having six shillings Stamp-duty thereon.

KNOW ALL MEN by these presents, That I Alice Beauford, widow and sole executrix named in the last will and testament of Charles Beauford, mariner, late deceased, for divers good causes and considerations me hertunto moving, HAVE, made, ordained, autho-

authorized, constituted, and appointed, and by these presents do, make, ordain, authorize, constitute, and appoint, David Edwards, of Fleet-street, in the city of London, taylor, my true and lawful attorney, for me and in my name to appear before the judge or surrogate, constituted and appointed for the prerogative court of Canterbury, and in my name to pray and obtain probate of the said last will and testament of my said deceased husband, for my use and benefit; and when the same is obtained, for me and in my name, or in the name of him the said David Edwards, to ask, demand, require, and receive, of and from any person or persons, all and every sum and sums of money, now due and owing, or hereafter to become due and owing to me as sole executrix of the aforesaid will or otherwise howsoever, by means or virtue thereof; and to make any such composition or compositions with any person or persons from whom any such said sum or sums of money is, are, or shall be due and owing to me as aforesaid, for or concerning the same respectively, as he the said David Edwards shall think fit, and on receipt of such said sum or sums of money, or any part thereof, to make, sign, seal, and deliver proper and sufficient acquittances, receipts, releases, or discharges therefore, in my name or otherwise, and in case of non-payment, any action or actions, suit or suits, in law or equity to commence and prosecute for recovery thereof, and one or more attorney or attorneys under him the said David Edwards, for the purposes aforesaid, to make, constitute, and at his pleasure to revoke, and to do all other lawful acts and things whatsoever concerning the premises as fully in every respect as I myself might or could do if personally present, ratifying, allowing, and confirming all and whatsoever my said attorney shall lawfully do or cause to be done, in or about the premises, by virtue of these presents: IN WITNESS whereof, I the said Alice Beauford have hereunto set my hand and seal, &c. [as in N<sup>o</sup> XI.]—This form will do for the executors of persons dying abroad who were not in the king's service, but for mariners who were, attention must be had to the following statute.

By statute 26 Geo. III. c. 63. s. 1. it is enacted, That, after the 1st August 1786, no letter of attorney made by any petty officer or seaman in the service of his majesty, his heirs or successors, or letter of attorney made by the executors or administrators of any such officer or seaman, in order to empower or entitle any person or persons to receive any wages, pay, or allowances of money of any kind, due or to grow due for such service, shall be good and valid, or sufficient for that purpose, unless the same shall be made and declared to be revocable by the express words thereof. And that no letter of attorney, or will, made by any petty officer or seaman in the service of his majesty, his heirs or successors, whereby any wages, pay, prize money, or allowance of money of any kind, due or to grow due for such service, is authorized to be received or bequeathed, shall be good and valid, and sufficient for the purpose, unless the same, if made by any such officer or seaman then in the service of his majesty, his heirs and successors, shall be signed before, and attested by the captain, or by the officer then commanding, and one

or other of the signing officers of the ship to which such petty officer or seaman shall belong, and shall specify in the body thereof the name of the ship, and also the number at which the maker of such will, or letter of attorney, stands upon the ship's book; or by the agent of any of his majesty's hospitals or quarters appointed to receive sick and wounded seamen, commonly called sick quarters, in which such petty officer or seaman, may be for the time; and unless such letter of attorney, or will, if made by any such officer or seaman, who shall have been discharged from the service of his majesty, his heirs or successors, or, if such letter of attorney is made by the executors or administrators of any such officer or seaman, and made within the bills of mortality of the cities of London and Westminster, is attested by an officer to be appointed by the treasurer of his majesty's navy, for the purpose of inspecting the wills, and letters of attorney, of such officers and seamen, or, if made at any of the ports where seamen's wages are paid, is attested by the treasurer of the navy's chief or second clerk there, or, if made at any other place, is attested by the minister and church-wardens of any parish in England or Ireland, or in that part of Great-Britain called Scotland, by the minister and two elders of the parish where such petty officer or seaman, executors or administrators, shall respectively reside.

SECT. 2. Every such letter of attorney, and will, shall contain the name of the ship to which the person granting the same last belonged, and also the full description of the residence, profession, or business, of the person to whom or in whose favour the said letter of attorney, or will, is made, and also the day of the month, and place where the said letter of attorney, or will, was executed.

SECT. 3. After every such letter of attorney, or will, be attested as above mentioned; if executed abroad, the same shall not be delivered to the party himself, or to any person for his behalf, but shall be sent by the commander of any of his majesty's ships, or agent of his majesty's hospitals or sick quarters, at the time when they transmit their respective returns to the navy and sick and hurt boards; if executed in Great-Britain or Ireland, shall be sent by those who attested the same, by the general-post, addressed to the treasurer or paymaster of the navy, at the navy pay-office, London.

SECT. 4. The said treasurer or paymaster shall immediately deliver over the letters of attorney and wills to the officer appointed to inspect them, who shall on receipt thereof register the same, and examine the signatures of the witnesses; and where any letter of attorney, or will, appears to the inspector not genuine and authentic he shall stop the same, and by the general-post acquaint the person in whose favour such letter of attorney is granted, or person or persons named executor or executors in such will, that the same is stopped, and the reason thereof. But if upon examination the same shall appear genuine and authentic, he, or a person authorized to officiate for him shall sign his name thereto, and put a stamp thereon, and the letter of attorney shall be kept as a voucher of the navy accounts; and the inspector shall give notice by the general-post to the attorneys when powers are approved, and also send checks to authorize them to receive the money, which checks shall be signed  
and



and stamped by the inspector, or person authorized to officiate for him, and stand in the place of the original letters of attorney, and be sufficient authorities to demand payment of all such wages, pay, prize money, or allowance of money, to which the persons granting the letters of attorney were entitled to for their service on board any of his majesty's ships. The inspector shall in like manner give notice to executors of his approbation of wills, and send them checks in like manner as directed with respect to letters of attorney, which checks shall be sufficient authorities for them, or their attornies to apply upon testators deaths to the inspector, requesting that the wills may be directed and sent by him to a proctor in Doctors-Commons, where they may on application obtain probates thereof; which, when obtained, shall be lodged with the inspector, who, or the person authorized to officiate for him, shall certify upon the checks formerly delivered, that probates have been granted, and the checks shall then, to such executors stand in the place of such probates, and be sufficient authorities to demand payments of all sums that shall be due to them as executors to the parties who made the said wills.

SECT. 5. The inspector shall in return to all letters of attorney and wills received by him from ministers of parishes, give notice as aforesaid to the said minister who transmitted the same, and not to the grantor thereof, of his having passed and approved of such letter of attorney, or will, and send the check by the general-post, made out in the manner above mentioned, to the said minister; and which notice from the said inspector shall be addressed to the minister of the parish (naming the same) without inserting the name of such minister, to be delivered to him at his manse or dwelling-house; and every such minister of a parish shall deliver the said check to the party who executed such letter of attorney or will. And all letters and packets addressed to, or sent by, the said treasurer or paymaster of the navy, or inspector to be appointed as aforesaid, shall, from and after the passing of this act, be sent and received free from the duty of postage, in the same manner and under the same restrictions as the clerk assistant, and chief clerk without doors, of the house of commons of Great-Britain, now send and receive the same.

SECT. 6. Grants of letters of attorney shall, by all captains and commanders of ships, be inserted in the monthly returns.

SECT. 7. When any petty officer or seaman belonging, or who shall have belonged to any of his majesty's ships, shall die intestate, leaving any wages, pay, prize money, or allowance of money of any kind, due to them in respect of such service, the same shall not be paid unto any representative of such intestate, but upon letters of administration to be obtained in the following manner; *viz.* The person claiming such administration shall give in a note or petition to the inspector of seamen's wills, stating the name of the deceased, and to what part of his majesty's dominions he originally belonged, and the name or names of the ship or ships on board of which he served, together with his own name and addition at full length, and his relation to, or connection with, the deceased, and also what other relations, to the best of his knowledge, the deceased has alive at the time, and where they are resident; and which petition

sion shall be certified by two reputable house-keepers of the parish, town, or place where such petitioner is resident, certifying that they believe the contents of the said petition to be true; and which petition and certificate shall be further certified by the minister of the parish, and two of the church-wardens, or two of the elders, certifying that the two persons who certified the petition, in manner above mentioned, are resident within the parish, and persons of good repute: whereupon the inspector of seamen's wills, as aforesaid, shall make such inquiry as to him shall seem necessary for ascertaining the truth of the said petition; and if, upon such inquiry, he shall be satisfied of the truth thereof, and it also appearing that no will of such deceased has been lodged with him, he shall deliver or send, to the person claiming to be such administrator, an abstract of the said petition, with a note or ticket subjoined thereto, signed by the said inspector or person authorized to officiate for him, and marked with his stamp, certifying that the contents of the said petition appear to him to be true, and that the person claiming to be administrator may obtain letters of administration to the deceased, provided he is otherwise entitled thereto by law; which certificate shall be directed by the inspector to a proctor in Doctors-Commons, for the purpose that letters of administration may pass in favour of the petitioner, if entitled thereto by law, but not otherways; and such original petition and certificate shall be lodged and remain in the records of the treasurer of the navy, and be preserved by him; and the letters of administration, when obtained, shall be lodged and registered, in the same manner with the probates of wills, in the hands of the inspector, who is hereby directed to grant a check, signed and stamped by him, or by the person authorized to officiate for him, to the administrators, or their attorneys, which shall stand in the place of the administration, and be to them a sufficient authority to demand payment of and discharge all sums that shall be due to them as administrators to the party deceased.

SECT. 8. If any proctor, register, or other officer of any ecclesiastical court, shall be aiding and assisting in procuring probate of the will, or letters of administration, for the purpose of enabling any person to receive the wages, pay, prize money, or allowance of money of any kind, due or becoming due for their service on board any ship or ships therein, or formerly belonging to his majesty, his heirs and successors, without first obtaining the certificate from the inspector of seamen's wills and letters of attorney, or person authorized to officiate for him, in manner above directed, every such proctor, register, or other officer, shall forfeit and pay the sum of five hundred pounds, and for ever after be incapable of acting as proctor, register, or in any other capacity, in any ecclesiastical court in Great-Britain or Ireland.

SECT. 9. Abstracts of this act shall be hung up and affixed to the most public place of every ship and vessel of his majesty, his heirs and successors, as soon as the ship or vessel be put into sea pay; and constantly kept and renewed, so that the same may at all times be accessible to the petty officers and seamen; and no captain shall have his general certificate till the navy board are satisfied thereof.

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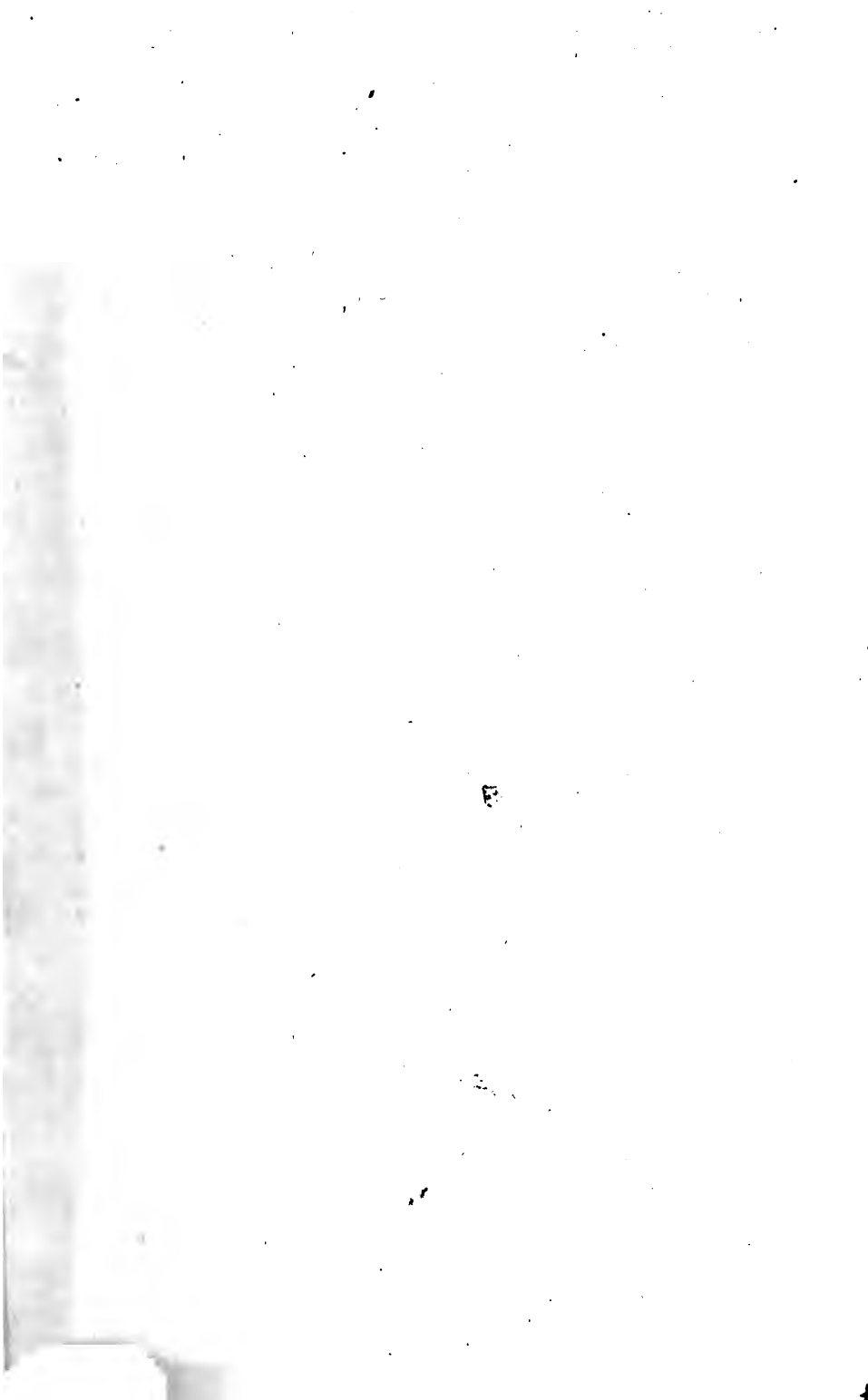
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# F I N I S.











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